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TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1890.

No. ~~1318~~. 824

THOMAS KNIGHT, PLAINTIFF IN ERROR,

vs.

THE UNITED LAND ASSOCIATION AND CLINTON C. TRIPP.

IN ERROR TO THE SUPREME COURT OF THE STATE OF CALIFORNIA.

FILED OCTOBER 6, 1890.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1890.

No. 1348.

THOMAS KNIGHT, PLAINTIFF IN ERROR,

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JUDD & DETWEILER, PRINTERS, WASHINGTON, D. C., MARCH 30, 1891.

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No. 12748.

In the Supreme Court of the State of California, Department No. --.

UNITED LAND ASSOCIATION and CLINTON C. TRIPP, Plaintiffs and Respondents,
vs.
THOMAS KNIGHT, Defendant and Appellant.

Transcript on Appeal.

E. F. Preston, attorney for defendant and appellant; Philip G. Galpin, attorney for plaintiffs and respondents.

Endorsed: Filed this 29th day of June, 1888. J. D. Spencer, clerk, by Ben. M. Maddox, deputy clerk.

1½ In the Supreme Court of the State of California.

Transcript on Appeal.

In the Superior Court in and for the City and County of San Francisco, State of California, Department 4.

UNITED LAND ASSOCIATION and CLINTON C. TRIPP, Plaintiffs,
v.
THOMAS KNIGHT, Defendant.
No. 2804.

Complaint in Ejectment.

The plaintiffs above named, complaining of defendant above named, for causes of action allege—

2

I.

That the plaintiff The United Land Association is duly incorporated under the laws of the State of California.

II.

That the plaintiff Clinton C. Tripp is a citizen of the State of Illinois and not a citizen of the State of California.

III.

That the defendant, as plaintiffs are informed and believe, is a citizen and resident of the State of California.

IV.

That on the 20th day of November, 1880, the said plaintiffs were owners and seized in fee and possessed and entitled to the possession of all that certain parcel of land situate in the city and county of San Francisco, State of California, and described as follows, to wit: Commencing at the southwest corner of Seventh and Berry streets, thence along the southwest side of Seventh street to Channel street; thence at right angles along the northwest side of Channel street to the corner of Eighth street if extended; thence at right angles northwesterly along the easterly side of Eighth street to Berry street; thence at right angles northeasterly along the southeasterly side of Berry street to the point of commencement—

Being known on the official map of the city and county of San Francisco as block number forty (40).

3 V.

That while the plaintiffs were such owners and seized and possessed and entitled to the possession of said land and premises the said defendant did, on the day and year aforesaid, wrongfully and unlawfully enter into and upon the same and oust and eject the plaintiff therefrom, and ever since that day wrongfully and unlawfully withheld and still and now wrongfully and unlawfully do withhold the possession thereof from the plaintiffs, to their damage in the sum of one hundred dollars.

That the value of the rents and profits of the said land and premises is one hundred dollars per month, and that by reason of the unlawful withholding of said land by the defendant as aforesaid plaintiffs have been deprived of said rents since the 20th day of November, 1880, and to their loss and damage in the sum of five hundred dollars. Wherefore the plaintiffs pray judgment against the said defendant for the restitution of said land and premises and for the sum of five hundred dollars damages for the withholding thereof and six hundred dollars damages caused by the loss of the value of the rents and profits thereof, together with costs of suit.

D. K. TRIPP,
Att'y for Plaintiffs.

HARMON & GALPIN, *Of Counsel.*

(Duly verified.)

(Endorsed:) Filed Nov. 23rd, 1880. Wm. A. Stuart, clerk, by P. Deveney, deputy clerk.

4 (Title of Court and Cause.)

Answer.

The defendant above named, by Benjamin S. Brooks, his attorney, in answer to the complaint herein, says—

That he has no information or belief on the subject sufficient to enable him to answer the allegation that the plaintiff The "United

Land Association" is a corporation duly incorporated under the laws of the State of California, and therefore denies that the plaintiff The United Land Association is a corporation duly incorporated under the laws of the State of California.

That he has no information or belief on the subject sufficient to enable him to answer the allegation "that the plaintiff Clinton C. Tripp is a citizen of the State of Illinois and not of the State of California," and therefore denies that the plaintiff Clinton C. Tripp is a citizen of the State of Illinois and not a citizen of the State of California.

That he denies that on the 20th day of November, 1880, or at any other time the said plaintiffs, or any other person except this defendant, was the owner, or seized in fee, or possessed, or entitled to the possession of all that certain piece or parcel of land situate in the city and county of San Francisco, State of California, and particularly described in the said complaint on file herein.

That he denies that while the plaintiffs were such alleged owners, or so seized, or possessed, or entitled to the possession of said land and premises the said defendant did on the day and year
5 aforesaid or that he did at any time wrongfully and unlawfully enter into and upon the same or oust or eject the plaintiffs therefrom or ever since that day or any other time wrongfully and unlawfully withholds the possession thereof from the plaintiffs or either of them, to their damage in the sum of one hundred dollars or any sum whatsoever.

Denies that the rents and profits of the said land and premises is one hundred dollars per month or any sum whatever, or that by reason of the alleged unlawful withholding of the said land by this defendant plaintiffs have been deprived of said rents since the 20th day of November, 1880, or any other time, or that said plaintiff suffered loss or damage in the sum of five hundred dollars or any other sum.

Wherefore defendant prays to be hence dismissed with his costs of suit.

B. S. BROOKS,
Attorney for Defendant.

(Duly verified.)

(Endorsed:) Filed March 17, 1883. William T. Sesnon, clerk, by John J. Kenny, deputy clerk.

(Title of Court and Cause.)

Order of Reference.

In accordance with the stipulation of the respective counsel herein, it is hereby ordered that this case be, and is hereby, referred
6 to Philip Teare, Esq., to try all the issues and report his findings and judgment thereon.

J. V. COFFEY, *Judge.*

San Francisco, Oct. 26, 1887.

(Endorsed:) Filed Oct. 28, 1887. Wm. J. Ruddick, clerk, by Thos. Croke, deputy clerk.

(Title of Court and Cause.)

Defendant's Bill of Exceptions.

Be it remembered that on the twenty-sixth day of October, 1887, the above cause was referred by order of the court to Philip Teare, Esq., to take the testimony, try all the issues of law and fact, and enter judgment thereon.

That thereafter the parties appeared before Hon. Philip Teare, referee aforesaid, on the twenty-ninth day of February, 1888—the plaintiffs by Philip G. Galpin, their attorney, and the defendant by E. E. Preston, his attorney.

To sustain the issues on behalf of plaintiffs they introduced testimony showing that the premises in question are located on the surface of the earth between Barry, Channel, Seventh and Eighth streets, in the city and county of San Francisco, State of California, and that the plaintiffs held title thereto under a grant from the State of California and various mesne conveyances, provided the title to said premises was originally in the State and provided a certain deed hereinafter mentioned was effectual to convey said title.

7 For the purpose of proving title in the State plaintiffs offered evidence as follows:

The plaintiffs called as a witness GEORGE R. TURNER, who testified that he had been a civil engineer and surveyor for over twenty-five years; was deputy county surveyor of the county of San Francisco in 1852; was city and county surveyor thereof from October, 1857, to October, 1861, and since then deputy city and county surveyor for six or seven years.

The witness having testified that he knew where the premises were located, and that he had made surveys in that neighborhood in 1854, was asked this question:

Q. Where did the line of ordinary high-water mark run in the neighborhood of the block between Seventh and Eighth, Berry and Channel streets (of which the premises in controversy herein are a portion), at the time you first remember it?

This question was objected to as incompetent, immaterial, and irrelevant, and that parol evidence was inadmissable to prove the location of the boundary lines described in the decree. The objection was overruled, the evidence was admitted, and the defendant duly excepted.

The witness testified "that at his earliest recollection of the neighborhood the line of ordinary high-water mark was far above and to the north and west of the premises."

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Question by Mr. GALPIN:

Q. At that time, viz., in 1854, where was the surface of this block with reference to the surface of the water at ordinary high tide?

8 Defendant objected that said question was immaterial, irrelevant and incompetent, and not the best evidence of the fact enquired of. Objection overruled, and defendant excepted.

The witness answered:

A. The surface of the block at ordinary high tide was far below the surface of the water.

Q. How far up was Mission creek navigable at that time?

Same objection as the last; same ruling and exception.

A. I saw scows loaded with brick away above, to the west of these premises—above Sixteenth street.

Counsel for plaintiffs then read in evidence the judgment-roll in the case of The City and County of San Francisco *v.* The United States, begun in the board of land commissioners, by the filing of a petition therein, in 1852, in which petition the city asks that four square leagues of land be confirmed to her; also the decree therein of the court, which is found in finding 16; also offered in evidence the first survey of the lands of the said city under said decree, produced from the office of the United States surveyor general for the district of California, made and approved by L. Upson, United States surveyor general, August 16th, 1868, and confirmed by Commissioner of the Land Office J. A. Williamson November 11th, 1878, being the survey mentioned in the twelfth finding (on this survey is traced the boundary line of the land confirmed to

9 said city by said decree of the circuit court of the United States in said case); also the certificate of approval of L. Upson, who was at its date United States surveyor general, in the words and figures following:

"The field-notes of the survey of the pueblo of San Francisco from which this plat is made have been examined and approved and are on file in this office.

"L. UPSON.

"United States surveyor general's office, San Francisco, Aug. 13, 1868."

(Here follows map marked p. 9.)

Also the confirmation thereof by the decision of J. A. Williamson, who was then Commissioner of the General Land Office, dated November 11th, 1878. In said survey the boundary line of the pueblo is run to the north and west of the premises in controversy, and they are left outside of this survey.

The plaintiffs also proved by said George Turner that the premises in controversy were below ordinary high-water mark as laid down on said survey.

To said survey and said parol proof of the location of the premises with reference to the line of high tide as delineated on said survey and to each of them defendant duly objected "that the said survey was not competent evidence, for that the same was not matter of record; secondly, that said survey did not tend to prove, as between the parties to this action, where said line was, being *res inter alios acta;* that said survey had been cancelled and superceded by a second or subsequent survey made by F. Von Leicht in accordance with instructions of the Secretary of the Interior."

The objections were overruled, the survey was admitted in evidence, and the defendant duly excepted.

Plaintiffs also produced in evidence a map made by Butler, surveyor and engineer, in 1857, and printed and published by Nathaniel Gray in San Francisco in 1857, showing the line of ordinary high-water mark at about the same line as on said survey approved by Upson.

Also a book of maps from the office of the city and county surveyor of said city made by Geo. C. Potter in 1863–4, the then city and county surveyor, showing the line of ordinary high-water mark at about the same line as on said survey approved by Upson.

Also a map of the United States Coast Survey, made in 1857, showing the line of high tide at about the same line as on said survey approved by Upson; also a map of the United States Coast Survey, made by Capt. W. P. Palmer in 1859, showing the line of high tide at about the same line as on said survey approved by Upson.

Also a map made by R. P. Bridgens, civil engineer, and published by M. Bixby in 1853, showing the line of high tide at about the same line as on said survey approved by Upson.

To all said maps said defendant objected that they were incompetent, immaterial, and irrelevant. Said objections were overruled, and defendant excepted.

Plaintiffs introduced also in evidence from the office of the clerk of the board of supervisors the original minute book of the proceedings of the board of supervisors of said city and county, and read a resolution of said board, passed on the 23rd day of December, 1878, "that no appeal be taken from the decision on said survey of J. A. Williamson."

Same objections. Overruled, and defendant excepted.

Plaintiffs' counsel offered in evidence two deeds from the board of State tide land commissioners to George W. Ellis, dated the 24th day of November, 1875, and acknowledged on the 27th day of November, 1875, and recorded on the 29th day of December, 1875, Book 816 of Deeds, pages 7 to 21, inclusive, together with the letter of the attorney general, John L. Love, dated November 5th, 1875, which letter can be found in finding 7.

Said deeds cover the premises in controversy, which are more fully described in finding 5.

Whereupon the defendant objected to said deeds on the ground that they are incompetent, in that the board of tide land commis-

sioners had no power or jurisdiction to make such deeds; upon the further ground that it does not appear from the deed nor has it been proven in evidence that the board was advised by the attorney general to make such a deed. Objection overruled, and defendant duly excepted, and the plaintiff read said deeds and letter.

12 Here plaintiffs rested their case.

The defendant offered in evidence the patent of the pueblo lands issued by the Government of the United States of America to the city of San Francisco, dated the 20th day of June, 1884, signed by the President, Chester A. Arthur, by William H. Cook, secretary, and S. W. W. Clark, of the General Land Office. Recorded at the request of Washington Bartlett, mayor, July 5th, 1884, in Liber 1 of Patents, page 91. The patent is more fully set out in finding 16.

Defendant's counsel offered the plat of the pueblo lands of San Francisco, finally confirmed to the city of San Francisco, surveyed under instructions from the United States surveyor general by F. Von Leicht, United States deputy surveyor, in December, 1883, together with the courses, distances, and boundaries tabulated on said map. Endorsed also: "Approved May 15th, 1884. M. C. McFarland, Commissioner of the General Land Office;" and also endorsed:

"The field-notes of the survey of the pueblo lands of San Francisco, from which this plat has been made, are strictly in accordance with the instructions of the honorable Commissioner of the General Land Office received with his letter, dated November 25, 1883, as the same appear of record and on file in this office. United States surveyor general's office, San Francisco, California, January 17th, 1884. W. H. Brown, United States surveyor general for California."

It was admitted that the patent includes within its exterior boundaries the land in question.

13 Plaintiffs objected to said patent that it was incompetent evidence to show title in the city of San Francisco as against grantees of the State to the premises in question, because:

1st. The State of California acquired her title by virtue of her sovereignty on her admission into the Union, and her title could not be overthrown by declarations of the United States made after title had vested in her.

2d. That as to lands acquired by virtue of her sovereignty, the State was not the owner of a private land claim and was not bound to present her claims to the board of land commissioners, organized under the act of Congress entitled An act to ascertain and settle the private land claims in the State of California, passed March 3, 1851, nor is she concluded as to her rights by not presenting them as provided in section 13 thereof, nor by any decision on the claim of another person. The act did not apply to her or her property.

3d. The only authority for the patent was a decree of the United States circuit court, which court was not vested with jurisdiction over the State or the property of the State, although it was vested with jurisdiction over natural persons and corporations. Neither

To said survey and said parol proof of the location of the premises with reference to the line of high tide as delineated on said survey and to each of them defendant duly objected "that the said survey was not competent evidence, for that the same was not matter of record; secondly, that said survey did not tend to prove, as between the parties to this action, where said line was, being *res inter alios acta;* that said survey had been cancelled and superceded by a second or subsequent survey made by F. Von Leicht in accordance with instructions of the Secretary of the Interior."

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12 Here plaintiffs rested their case.

The defendant offered in evidence the patent of the pueblo lands issued by the Government of the United States of America to the city of San Francisco, dated the 20th day of June, 1884, signed by the President, Chester A. Arthur, by William H. Cook, secretary, and S. W. W. Clark, of the General Land Office. Recorded at the request of Washington Bartlett, mayor, July 5th, 1884, in Liber 1 of Patents, page 91. The patent is more fully set out in finding 16.

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It was admitted that the patent includes within its exterior boundaries the land in question.

13 Plaintiffs objected to said patent that it was incompetent evidence to show title in the city of San Francisco as against grantees of the State to the premises in question, because:

1st. The State of California acquired her title by virtue of her sovereignty on her admission into the Union, and her title could not be overthrown by declarations of the United States made after title had vested in her.

2d. That as to lands acquired by virtue of her sovereignty, the State was not the owner of a private land claim and was not bound to present her claims to the board of land commissioners, organized under the act of Congress entitled An act to ascertain and settle the private land claims in the State of California, passed March 3, 1851, nor is she concluded as to her rights by not presenting them as provided in section 13 thereof, nor by any decision on the claim of another person. The act did not apply to her or her property.

3d. The only authority for the patent was a decree of the United States circuit court, which court was not vested with jurisdiction over the State or the property of the State, although it was vested with jurisdiction over natural persons and corporations. Neither

the decree nor any proceedings under the decree could affect the title of the State or furnish evidence against her.

4th. The State was not a party to the record in the case of The City, etc., *v.* The United States, nor is she affected as a natural person or corporation would be by a failure to attend before the United States surveyor general and object to a survey, as provided in section one of the act of Congress approved July 1, 1864, and entitled "An act to expedite the settlement of titles to lands in the State of California."

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But, being a stranger to the entire record and proceeding, the patent is not competent evidence against her or her property.

5th. The first survey is the final adjudication of the Land Office of the location of the premises described in the decree, because—

(*a.*) In confirming a survey under the acts of March 3, 1851, and July 1, 1864, the Commissioner acts in a special judicial capacity and his decisions are not appealable to the Secretary of the Interior.

(*b.*) The city refused to appeal, and this refusal appears in the record, and there was no appeal.

(*c.*) The first confirmed survey is better evidence of the location in this case than the patent and the patent is void to the extent that it departs from it.

(*d.*) The decree confirms to the city only the land above or within the ordinary high-water mark at the date of the conquest.

The premises are outside that specific boundary, and, as the surveyor general had no authority under the acts of Congress to survey nor the Land Office to patent land not confirmed to the claimant, the decree controls and the patent is void to the extent that it departs from the specific boundary given in the decree.

15

The court admitted the evidence, but refused to find for defendant, and the defendant duly excepted.

The defendant's counsel introduced the judgment-roll in the case of Thomas Knight *v.* The City and County of San Francisco, in which a judgment in favor of the plaintiff was rendered November 6, 1868, quieting title of the plaintiff to the premises.

And whereas the said alleged errors in the rulings of this court do not otherwise appear of record, I have this day signed and sealed this bill of exceptions.

In witness whereof I have hereto set my hand and seal this 31st day of May, 1888.

The foregoing bill of exceptions allowed.

PHILIP TEARE, *Referee.* [L.S.]

E. F. PRESTON,
Attorney for Defendant.

P. G. GALPIN,
Attorney for Plaintiffs.

(Endorsed:) Filed June 1st, 1888. Wm. J. Ruddick, clerk, by R. T. Barrett, deputy clerk.

(Title of Court and Cause.)

Findings.

This cause having been referred to me by an order of said superior court to hear and determine the issues between the
16 parties, plaintiff and defendant, and to report a judgment, the said parties appeared before me at my office, in the city and county of San Francisco, on the 29th day of February, 1888, the plaintiffs by Philip G. Galpin, their attorney, and the defendant by E. F. Preston, his attorney, and witnesses on behalf of both parties were examined and documentary evidence was also introduced and the cause was argued and submitted, and I do find as facts proven herein as follows:

I.

The defendant entered upon and took possession of the premises described in the complaint on the 20th day of November, 1880, and kept the possession thereof until the 23d day of November, 1880 (which was the date of the filing of the complaint herein), and since then to the present time.

II.

The plaintiffs, The United Land Association, is and was at the date of the filing of said complaint a corporation duly incorporated under the laws of the State of California.

III.

That the premises in the complaint described are situated in the city and county of San Francisco, State of California, and below ordinary high-water mark as the same existed on the 7th day of July, 1846.

17 IV.

That said premises are below and outside of a certain survey or claim of the said city and county filed in the office of the United States surveyor general, approved by him August 13th, 1868, and approved by the commissioner general of the Land Office November 11, 1878, and hereinafter mentioned in finding 12.

V.

On the 24th day of November, 1875, one George W. Ellis became seized in fee of said premises under and by virtue of two certain deeds of grant, bargain, and sale, to him then and there executed and delivered by the State board of tide land commissioners, for and in consideration of the sum of eight thousand dollars, which were then and there paid to said board and were covered into the treasury of said State. Said deeds were duly acknowledged and were recorded in the recorder's office of said city and county on or before the 29th day of December, 1875.

VI.

That at the time of and prior to the execution and delivery of said deeds to said Ellis and on the 5th day of November, 1875, John L. Love was attorney general of the State of California, Romualdo Pacheco was Governor thereof, James J. Green was controller thereof, and Robert Gardner was surveyor general thereof, and that said Pacheco, Green, and Gardner then constituted said State board of tide land commissioners.

18

VII.

That on said 5th day of November, 1875, said board of State tide land commissioners held a regular meeting of said board, whereat there was received and spread upon the minutes thereof the following communication to said board from said attorney general:

SAN FRANCISCO, *Nov.* 5, 1875.

I hereby advise the State board of tide land commissioners to dispose of all lands where there is no litigation and where they can ascertain to whom the State title ought to go in pursuance of the tide land acts, November 25th, 1875.

JOHN L. LOVE,
Attorney General.

VIII.

That on the 30th day of November, 1875, the said George W. Ellis, Creed Haymond, and C. P. Duane conveyed said premises to one William H. Patterson by deed of grant, bargain, and sale, together with all interest therein which they then had or might thereafter acquire, to secure the payment to said Patterson of eight thousand dollars, with power, in default of payment within sixty days thereafter, to sell said premises on giving one week's notice thereof in some daily newspaper published in said city and county of San Francisco and upon the security of said deed of trust.

IX.

That said sum of eight thousand dollars was not repaid
19 nor any part thereof within said sixty days nor at any time, and thereafter said Patterson duly advertised said premises for sale at public auction in a daily newspaper published in said city and county of San Francisco for a longer period than was required by the terms of said trust deed, and during each and every day of said period of time and at the time and place specified in said advertisement, and on the third day of September, 1877, sold said premises at public auction to the highest bidder for cash, in accordance with the terms of said instrument, for the sum of ten thousand seven hundred and sixty-three dollars, being the principal and interest due on said indebtedness, to one A. C. Hammond, to whom said Patterson thereafter executed a deed of grant, bargain, and sale of said premises, whereby said Hammond became seized thereof.

X.

That said Hammond, by deed of grant, bargain, and sale of the premises, executed and delivered on the third day of September, 1877, conveyed said premises to the plaintiff C. C. Tripp, and that said Tripp, by deed of grant, bargain, and sale of fifteen-sixteenths of said premises, executed and delivered on the 27th day of May, 1878, conveyed an undivided fifteen-sixteenths of said premises to the plaintiff The United Land Association.

XI.

That in the case of The City and County of San Francisco *v.* The United States, originally brought before the board of land
20 commissioners organized under the act of Congress of March 3d, 1851, entitled "An act to settle private land claims in the State of California," a petition was filed on the second day of July, 1852, stating the claim of the city of San Francisco, as successor to the Mexican pueblo of Yerba Buena, to four square leagues of land on the peninsula of San Francisco.

That said cause was transferred into the circuit court of the United States for the northern district of California under the act of July 1st, 1864, entitled "An act to expedite the settlement of titles to lands in the State of California," and said cause was there tried and determined, and decree in said court and cause was rendered on the 18th day of May, 1865, and that said decree was never vacated or revoked, nor reversed on appeal, but remains in full force and virtue; that by said decree there was confirmed to said city and county of San Francisco a tract situated within said county and embracing so much of the "extreme upper portion of the peninsula above high-water mark (as the same existed at the date of the conquest of the country, namely, the 7th day of July, 1846), on which the city of San Francisco is situated as will contain an area of four square leagues," said tract being bounded on the north and east by the Bay of San Francisco, on the west by the ocean, and on the south by a due east-and-west line." Said decree is recited in the 16th finding of fact herein.

21 XII.

That for the purpose of carrying said decree into effect and of determining the location of the east-and-west line therein mentioned in such place that the boundaries given in said decree would include four square leagues the surveyor general of the State of California, acting under and by virtue of the authority of said decree, surveyed the line of ordinary high-water mark as the same existed at the date of the conquest of the country, viz., on the 7th day of July, 1846; that said survey was duly made in the years 1867 and 1868, and was duly approved by L. Upson, then surveyor general of the United States for the State of California, and thereafter said survey, on the 11th day of November, 1878, was approved by J. A. Williamson, commissioner general of the Land Office.

XIII.

No appeal was ever taken by the city and county of San Francisco from said approval, but an appeal was taken by the United States from that part of the survey which bounds the Presidio reservation. Such appeal did not touch or affect the premises in question.

XIV.

Subsequently, on the 28th day of November, 1879, the then Secretary of the Interior sent for all the papers in said case, and upon the same, without taking other or further proof, ordered that
22 said survey be amended, and thereafter, by a subsequent Secretary of the Interior, an order was made directing a new survey.

XV.

A new or second survey was made in the year 1884 by Frederich Von Leicht, which was not approved by the surveyor general of the State of California, but was certified by him to have been made in accordance with orders of the Secretary of the Interior, dated March 3d, 1881, and July 12th, 1883.

XVI.

On this survey, and following the description contained in the field-notes thereof, a patent of the United States, under its seal, and signed by the President thereof, was issued on the 20th day of June, 1884.

The substantial parts of said patent are as follows, omitting immaterial portions of the field-notes:

UNITED STATES OF AMERICA.

To all to whom these presents shall come, greeting:

Whereas it appears from a duly authenticated transcript, filed in the General Land Office of the United States, that pursuant to the provisions of the act of Congress approved the third day of March, anno Domini one thousand eight hundred and fifty-one, entitled "An act to ascertain and settle the private land claims in the State of California," the City of San Francisco, by its attorney, filed a petition on the second day of July, anno Domini one thou-
23 sand eight hundred and fifty-two, with the commissioners to ascertain and settle the private land claims in the State of California, sitting as a board at the city of San Francisco, in which petition it claimed the confirmation of its title to a certain "tract or parcel of land situate in the county of San Francisco and State aforesaid, and being so much of the peninsula where the said city is located as will contain an area equal to four square leagues, said parcel or tract being bounded on the north and east by the waters of the Bay of San Francisco, on the west by the Pacific Ocean, and on the south by a due east and west line, including the area aforesaid;

And whereas the board of land commissioners aforesaid, on the twenty-first day of December, anno Domini one thousand eight hundred and fifty-four, in the cause entitled "The City of San Francisco *v.* The United States," rendered a decree of confirmation in favor of the claimant, which decree or decision having been taken on appeal to the circuit court of the United States for the northern district of California, the said court, on the eighteenth day of May, anno Domini one thousand eight hundred and sixty-five, in the cause entitled "The City of San Francisco *v.* The United States," rendered its decision as follows, to wit:

"The appeal in this case taken by the petitioner, The City of San Francisco, from the decree of the board of land commissioners to ascertain and settle private land claims in the State of Cali-
24 fornia, entered on the twenty-first of December, 1854, by which the claim of the petitioner was adjudged to be valid and confirmed to the lands within certain described limits, coming on to be heard upon the transcript of proceedings and decision of said board and the papers and evidence upon which said decision was founded, and further evidence taken in the district court of the United States for the northern district of California pending said appeal, the said case having been transferred to this court by order of the said district court under the provisions of section four of the act entitled 'An act to expedite the settlement of titles to lands in the State of California,' approved July 1st, 1864, and counsel of the United States and for the petitioner having been heard and due deliberation had, it is ordered, adjudged, and decreed that the claim of the petitioner, The City of San Francisco, to the land hereinafter described is valid, and that it be confirmed.

"The land of which confirmation is made is a tract situated within the county of San Francisco and embracing so much of the extreme upper portion of the peninsula above ordinary high-water mark (as the same existed at the date of the conquest of the country, namely, the seventh of July, A. D. 1846) on which the city of San Francisco is situated as will contain an area of four square leagues, said tract being bounded on the north and east by the Bay of San Francisco, on the west by the Pacific Ocean, and on the south by a due
25 east-and-west line drawn so as to include the area aforesaid, subject to the following deductions: Such parcels of land as have been heretofore reserved or dedicated to public uses by the United States, and also such parcels of land as have been by grants from lawful authority vested in private proprietorship and have been finally confirmed to parties claiming under said grants by the tribunals of the United States or shall hereafter be finally confirmed to parties claiming thereunder by said tribunals in proceedings now pending therein for that purpose (all of which said excepted parcels of land are included within the area of four square leagues above mentioned, but are excluded from confirmation to the city). This confirmation is in trust for the benefit of the lot-holders under grants from the pueblo, town, or city of San Francisco or other competent authority, and as to any residue in trust for the use and benefit of the inhabitants of the city."

And thereafter the mandate of the Supreme Court of the United States dismissing the appeal taken from the decree of the said United States circuit court in this cause having been presented and filed in the said circuit court of the United States for California, the said circuit court, on the first day of February, anno Domini one thousand eighteen hundred and sixty-seven, in the cause entitled "The City of San Francisco *v.* The United States," ordered "that the said mandate be filed in this cause as a part of the records thereof,
and that the said appeals be respectively dismissed, etc.,
26 and that the parties be at liberty to proceed upon said decree
as upon a final decree of this court," whereby the proceedings of court upon title became final.

And whereas it further appears that prior to the final decree of the United States circuit court as aforesaid the following legislation was had in this cause, to wit, the fifth section of the act of Congress approved July first, anno Domini one thousand eight hundred and sixty-four, provides "that all the right and title of the United States to the lands within the corporate limits of the city of San Francisco, as defined in the act incorporating said city, passed by the Legislature of the State of California on the fifteenth of April, one thousand eight hundred and fifty-one, are hereby relinquished and granted to the said city and its successors for the uses and purposes specified in the ordinances of said city, ratified by an act of the Legislature of the said State approved on the eleventh of March, eighteen hundred and fifty-eight, entitled 'An act concerning the city of San Francisco and to ratify and confirm certain ordinances of the common council of said city,' there being excepted from this relinquishment and grant all sites or other parcels of lands which have been or now are occupied by the United States for military, naval, or other public uses, or such other sites or parcels as may hereafter be designated by
the President of the United States within one year after the
27 rendition to the General Land Office by the surveyor general
of an approved plat of the exterior limits of San Francisco, as recognized in this section in connection with the lines of the public surveys; and provided that the relinquishment and grant by this act shall in no manner interfere with or prejudice any *bona fide* claims of others, whether asserted adversely under rights derived from Spain, Mexico, or the laws of the United States, nor preclude a judicial examination and adjustment thereof;" and the act of Congress approved March 8th, anno Domini one thousand eight hundred and sixty-six, entitled "An act to quiet the title to certain lands within the corporate limits of the city of San Francisco," provide "that all the right and title of the United States to the lands situated within the corporate limits of the city of San Francisco, in the State of California, confirmed to the city of San Francisco by the decree of the circuit court of the United States for the northern district of California, entered on the eighteenth day of May, one thousand eight hundred and sixty-five, be, and the same are hereby, relinquished and granted to the said city of San Francisco and its successors, and the claim of the said city to said land is hereby confirmed, subject, however, to the reservations and

exceptions designated in said decree, and upon the following trusts, namely, that all the said land not heretofore granted to said city shall be disposed of and conveyed by said city
28 to parties in the *bona fide* actual possession thereof by themselves or tenants, on the passage of this act, in such quantities and upon such terms and conditions as the Legislature of the State of California may prescribe, except such parcels thereof as may be reserved and set apart by ordinance of said city for public uses: Provided, however, that the relinquishment and grant by this act shall not interfere with or prejudice any valid adverse right or claim, if such exist, to said land or any part thereof, whether derived from Spain, Mexico, or the United States, or preclude a judicial examination and adjustment thereof."

And whereas under the thirteenth section of said act of third March, anno Domini one thousand eight hundred and fifty-one, and the legislation supplemental thereto, and in accordance with the proceedings had pursuant to said act and supplemental legislation, there has been deposited in the General Land Office of the United States a return, with the descriptive notes and plat of survey, of the said claim confirmed as aforesaid, authenticated by the signature of the United States surveyor general for the State of California and his official seal, which descriptive notes and plat of survey, a tracing of which is hereunto annexed and made a part hereof, are in the words and figures as follows, to wit:

"U. S. SURVEYOR GENERAL'S OFFICE,
"SAN FRANCISCO, CAL., *January* 17, 1884.

29 "Under and by virtue of the provisions of the 13th section of the act of Congress of the third of March, 1851, entitled 'An act to ascertain and settle the private land claims in the State of California,' and of the 12th section of the act of Congress approved on the 31st of August, 1852, entitled 'An act making appropriations for the civil and diplomatic expenses of the Government for the year ending the 30th of June, 1853, and for other purposes;' as also the act of Congress approved July 1st, 1864, entitled 'An act to expedite the settlement of titles to lands in the State of California;' also the act of grant and confirmation by Congress, approved March 8, 1866, entitled 'An act to quiet the title to certain lands within the corporate limits of the city of San Francisco;' and whereas the U. S. circuit court for the northern district of California rendered a decision whereby it recognized and confirmed the title and claim of the city of San Francisco to the tract of land designated as the pueblo lands of San Francisco, as appears from the certified copy of the final decree of the said court, a copy of which is hereto annexed, I hereby certify that the accompanying map is a true and accurate plat of the said tract of land as appears by the field-notes of the survey thereof made by Ferdinand Von Leicht, deputy surveyor, under the direction of this office and in accordance with the decisions of the hon. Secretary of the Interior, dated respectively March 3, 1881, and July 12, 1883, which field-notes, having been examined, remain of record therein."

30 The descriptive notes of said survey are in the words and figures following, to wit: * * *

"91. Thence south twenty-eight degrees and forty-five minutes west seven chains and twenty-two links to station 92, at the mouth of Mission creek, on its left bank; course of creek is east near its mouth.

"Thence across Mission creek.

"92. South thirty-six degrees east three chains and fifty-five links to station 93, at mouth of Mission creek, on its right bank."

(Field-notes by courses and distances omitted.)

Now, know ye that the United States of America, in consideration of the premises and pursuant to the provisions of the act of Congress aforesaid of the third of March, anno Domini one thousand eight hundred and fifty-one, and the legislation supplemental thereto, has given and granted, and by these presents does give and grant, unto the city of San Francisco, its successors and assigns, and upon the trusts named and set forth in the decree of court aforesaid and in accordance with the provisions of the said act of Congress of March eight, anno Domini one thousand eight hundred and sixty-six, the tract of land embraced and described in the foregoing survey; but with the stipulation that in virtue of the fifteenth section of the said act neither the confirmation of this said claim nor this patent shall affect the interests of third persons, and with the further reservation and exception from the transfer by these presents, as excepted by the aforesaid decree of the circuit

31 court of the United States, dated the eighteenth day of May, anno Domini one thousand eight hundred and sixty-five, of "such parcels of land as have *been* heretofore reserved or dedicated to public uses by the United States, and also such parcels of land as have been by grants from lawful authority vested in private proprietorship and have been finally confirmed to parties claiming under said grants by the tribunals of the United States, or shall hereafter be finally confirmed to parties claiming thereunder by said tribunals in proceedings now pending therein for that purpose; all of which said excepted parcels of land are included within the area of four square leagues above mentioned, but are excluded from the confirmation to the city:

To have and to hold the said tract of land, with the appurtenances, unto the said The City of San Francisco, its successors and assigns forever, with the stipulation, reservation, and exception aforesaid.

In testimony whereof I, Chester A. Arthur, President of the United States, have caused these letters to be made patent and the seal of the General Land Office to be hereunto affixed.

Given under my hand, at the city of Washington, the twentieth day of June, in the year of our Lord one thousand eight hundred and eighty-four, and of the Independence of the United States the one hundred and eighth.

By the President:

[SEAL.]

32 CHESTER A. ARTHUR.
By WM. H. CROOK, *Secretary.*
S. W. CLARK,
Recorder of the General Land Office.

XVII.

The defendant did not connect himself with the title of the State.

XVIII.

The survey first made was approved by the surveyor general of the United States for the district of California. The second survey, being the one by Von Leicht, was not approved, but was certified to have been made in accordance with instructions of the Secretary of the Interior, as stated in finding 15.

From the foregoing facts I find the following conclusions of law:

I.

The State of California, upon her admission into the Union on the 9th day of September, 1850, became seized in fee of the premises described in the complaint herein.

II.

The grantees of the State became seized in fee of said premises by virtue of deeds made by the State board of tide land commissioners. The plaintiffs have succeeded to their title. These deeds are *prima facie* evidence of title, as is declared by an act of the Legislature of the State of California approved March 30th, 1868
33 (p. 716). The legal presumption is that the attorney general did approve of the compromise with Ellis. If he did not the objection is one which cannot be successfully made by defendant, who does not connect himself with the title of the State.

III.

The title which thus passed to the plaintiffs was subject to defeat by said decree of the United States circuit court in the case of The City and County of San Francisco *v.* The United States, and was defeated by it as to all premises confirmed to said pueblo, but no further, and the premises in controversy (being proven by the confirmed survey of November 11th, 1878, and by parol proofs, to be outside of the specific boundary given in said decree) remained the property of the State. (See findings of fact 3 and 4.)

IV.

The second survey was illegal because it was not approved by the surveyor general of the State of California, no appeal was taken to the Secretary of the Interior from the decision of the commissioner general of the Land Office approving the prior survey, and because the second survey was not retained in the office of the United States surveyor general for ninety days, and no notice of the same was given to enable parties in interest to file protests, as required by law, and because in approving said prior survey said commissioner
34 general of the Land Office was acting in a judicial capacity and his judgment thereon is not reversible and was not legally reversed.

V.

The description of the premises contained in said patent not being warranted by but being in excess of the premises described in the prior survey and in the decree, the patent to the extent that it covered land of the State not confirmed to the claimant was invalid, and did not operate to convey the State's title to the premises here in controversy. The surveyor general and the Land Office have no power to affect land not confirmed to the claimant. Whether they have exceeded their powers by granting land not entrusted to them to grant is a point to be decided by this court and not by the surveyor general nor the Land Office. The plaintiffs are entitled to judgment for the possession of the premises described in the complaint, together with the costs of this action.

PHILIP TEARE, *Referee.*

San Francisco, May 18, 1888.

(Endorsed:) Filed June 1st, 1888. Wm. J. Ruddick, clerk, by R. T. Barrett, deputy clerk.

(Title of Court and Cause.)

Judgment.

(No. 2804.)

MAY 18TH, A. D. 1888.

This cause having been referred by an order of court to
35 Philip Teare, referee, made October 26th, 1887, to hear and determine the issues between the parties, plaintiffs and defendant, and to report a judgment, *and* the said parties appeared before said referee on the 29th day of February, 1888, the plaintiffs by Philip G. Galpin, Esq., their counsel, and the defendant by E. F. Preston, Esq., his counsel, and witnesses on behalf of both parties were examined and certain documentary evidence was introduced. The evidence being closed, the cause was argued and submitted to the referee for consideration and decision, and after due deliberation thereon the referee delivers his finding and decision in writing, which is filed, and on application of Philip Teare, referee, judgment is entered in accordance therewith.

Wherefore, by virtue of the law and by reason of the premises aforesaid, it is ordered, adjudged, and decreed that The United Land Association and Clinton C. Tripp, plaintiffs, do have and recover from Thomas Knight, defendant, the restitution and possession of the premises situated in the city and county of San Francisco, State of California, and described as follows, to wit: Commencing at the southwest corner of Seventh and Berry streets, thence along the southwest side of Seventh street to Channel street, thence at right angles along the northwest side of Channel street to the corner of Eighth street if extended, thence at right angles northwesterly along the easterly side of Eighth street to Berry street, thence at right

angles northeasterly along the southeasterly side of Berry
36 street to the point of commencement, being known on the official map of the city and county of San Francisco as block number forty (40); and it is further ordered, adjudged, and decreed that said plaintiffs do have and recover from said defendant their costs incurred herein, amounting to the sum of $82.20.

Judgment recorded June 2d, 1888.

B. 3, p. 404, D. 4.

(Title of Court and Cause.)

Clerk's Certificate.

I, William J. Ruddick, county clerk of the city and county of San Francisco, State of California, and *ex officio* clerk of the superior court, do hereby certify the foregoing to be a true copy of the judgment entered in the above-entitled cause and recorded in Judgment Book 3 of said court at page 404, department No. 4.

And I further certify that the foregoing papers hereto annexed constitute the judgment-roll in said cause.

Witness my hand and seal of said superior court this 2d day of June, A. D. 1888.

[SEAL.] WILLIAM J. RUDDICK, *Clerk*,
By R. T. BARRETT, *Deputy Clerk*.

(Title of Court and Cause.)

Notice of Appeal.

You will please take notice that the defendant in the above-
37 entitled action hereby appeals to the supreme court of the State of California from the judgment of Philip Teare, referee, therein rendered on the 18th day of May, 1888, and entered in said action on the 2d day of June, 1888, in favor of the plaintiffs in said action and against said defendant, and from the whole thereof.

Yours, etc.,
E. F. PRESTON,
Attorney for Defendant.

Dated this 19th day of June, 1888.

To the clerk of said superior court and Philip G. Galpin, Esq., attorney for plaintiffs.

(Endorsed:) Service of the within notice of appeal admitted this 19th day of June, 1888. Filed June 19th, 1888. Philip G. Galpin, plaintiffs' attorney.

(Title of Court and Cause.)

Stipulation.

It is hereby stipulated that pending the appeal of the above-entitled action to the supreme court that all proceedings therein may be

stayed, and the plaintiffs hereby waive any and all undertaking required by law of said defendant in order to perfect an appeal to the supreme court and stay proceedings upon the judgment made and entered in said action.

PHILIP G. GALPIN,
Plaintiffs' Attorney.

June 19, 1888.

38 (Title of Court and Cause.)

Stipulation.

It is hereby stipulated by and between the parties to the above-entitled action that this transcript is a true and correct transcript of the several documents and papers purporting to be contained therein, the originals of which are on file and of record in said action, and that the same may be filed and used as the transcript on appeal from the order and judgment.

E. F. PRESTON,
Attorney for Defendant and Appellant.
PHILIP G. GALPIN,
Attorney for Plaintiffs and Respondents.

39 Service of the within and receipt of a copy thereof admitted this 29th day of June, 1888.

PHILIP G. GALPIN,
Attorney for Respondents.

40 *Submission of Cause.*

In the Supreme Court, State of California. In Bank.

UNITED LAND ASSOCIATION *et al.*
v.
KNIGHT. } 12748.

1889, March 8th.—Argued by Galpin, for respondent. Ordered respondent be allowed 10 days within which to file brief; cause to be thereon submitted.

Title Court and Cause.

1889, March 19th.—Filed respondent's brief and submitted.

Title Court and Cause.

1889, May 16th.—The appellant having failed to appear or file any brief in this cause, the judgment appealed from is affirmed.

THE COURT.

41 Title Court and Cause.

1889, May 21.—Filed substitution of J. A. Waymire as attorney for defendant.

Title Court and Cause.

1889, May 29.—Filed affidavit on application to set aside order of affirmance.

Title Court and Cause.

1889, May 29.—Filed stipulation to set aside order.

Title Court and Cause.

1889, May 29.—Upon the stipulation of the parties it is hereby ordered that the order heretofore made affirming the judgment herein be, and the same is hereby, set aside and the cause is restored to the calendar for argument.

BEATTY, *C. J.*
McFARLAND, *J.*
SHARPSTEIN, *J.*
WORKS, *J.*
THORNTON, *J.*

42 Title Court and Cause.

1889, August 14th.—Argued by Baggett for appellant, Galpin for respondent; and further argument continued.

Title Court and Cause.

1889, August 15th.—Argued by Galpin for respondent, Baggett for appellant; and submitted.

Title Court and Cause.

1889, Dec. 2.—Pursuant to stipulation it is ordered the submission in this cause be set aside and cause stand resubmitted as of date September 20, 1889.

Title Court and Cause.

1890, January 2d.—Judgment affirmed.

PATERSON, *J.*

We concur.

WORKS, *J.*
FOX, *J.*
SHARPSTEIN, *J.*

I dissent.

McFARLAND, *J.*

I concur in the judgment and will file an opinion hereafter.

THORNTON, *J.*

43 Title Court and Cause.

1890, Jan. 8.—Filed petition and notice of motion to set aside judgment.

Title Court and Cause.

1890, Jan. 17.—Filed petition for rehearing.

Title Court and Cause.

Jan. 17.—Application for a rehearing of the cause argued by Galpin for respondent, Taylor, Cope, and Waymire for petitioners; and submitted.

Title Court and Cause.

1890, Jan. 22.—Filed petition for rehearing by Wilson.

Title Court and Cause.

1890, Jan. 29.—Rehearing granted Jan. 28, 1890.

THE COURT.

44 Title Court and Cause.

1890, Feb'y 7.—Ordered cause be set for argument on Feb'y 21, 1890.

Title Court and Cause.

1890, Feb'y 21.—Counsel consent that Mr. Justice Works may participate in the decision of this cause.

Cause argued by Wilson, Waymire, and Taylor for appellant, Galpin for respondent. Ordered that counsel for appellant be allowed 20 days within which to file brief, respondent 20 days to reply, cause to be thereon submitted.

Title Court and Cause.

1890, May 24.—Filed reply briefs of *amicus curiæ* and submitted.

45 In the Supreme Court of the State of California. In Bank.

UNITED LAND ASSOCIATION and CLINTON C. TRIPP, Respondents, *vs.* THOMAS KNIGHT, Appellant.	No. 12748. On Appeal from the Superior Court in and for the City and County of San Francisco

And now, at this day, this cause being called and having been heretofore submitted and taken under advisement, and all and singular the law and premises having been fully considered, the opinion of the court herein is delivered by FOX, J.

We concur.

SHARPSTEIN, *J.*
PATERSON, *J.*

Concurring opinion.

THORNTON, *J.*

Dissenting opinion.

McFARLAND, *J.*

We concur in the dissenting opinion.

BEATTY, *C. J.*
WORKS, *J.*

Whereupon it is adjudged and decreed by the court that the judgment of the superior court in and for the city and county of San Francisco in the above-entitled cause be, and the same is hereby, affirmed.

46 *Opinion.*

In the Supreme Court of the State of California. In Bank.

(Filed September 4, 1890.)

UNITED LAND ASSOCIATION *et al.*, Respondents, *vs.* THOMAS KNIGHT, Appellant. } No. 12748.

This case was first heard and an opinion thereon filed in Department. Subsequently a rehearing in bank was granted, and, after argument, a decision was filed January 2, 1890. This was followed by divers petitions for a second rehearing, representing that the case was one of great public importance, involving the validity of land titles to a very considerable and what is now a very valuable portion of the city of San Francisco; and, in view of the alleged importance of the questions involved, a rehearing was granted. Upon this hearing elaborate oral arguments have been made, and all who desired have been permitted to file printed briefs and arguments, all of which have been carefully considered, and we are still constrained to adhere to the conclusion first reached in bank and announced in the opinion written by Mr. Justice Paterson, 22 Pac. Rep., 367.

This is not, as assumed on behalf of appellant, a case of conflict between two parties both claiming under the Government of the United States, nor is it a case where one is claiming under patent issued by the Government of the United States and the other is a mere naked trespasser failing to connect himself with any paramount source of title.

The defendant and those who are situate like him and on whose behalf argument is here made claims under the pueblo of San Francisco. That pueblo claimed and derived its title, not under the Government of the United States, but under the Government of Mexico. Its grant was not a special one made by the supreme legislative authority of the sovereign State, but was one made by the ministerial officers of the government under and necessarily in conformity with its general laws—necessarily so, for if the ministerial officers exceeded the authority conferred upon them by law, then their act was void. It must, therefore, be assumed that the grant was only such as the ministerial officers were authorized by law to make.

The patent of the United States invoked by the appellant is not an original grant—does not eminate from the source of title—but is a mere acknowledgment that the pueblo had title from the Mexican Government, the predecessor of the United States, and a release of all claim on the part of the United States to the property found

by its judicial tribunals to have been so vested in the pueblo. The patent was not necessary to invest the pueblo with title, for its title existed at the cession of the territory. It was recognized by the decree of final confirmation (cited in the former opinion), and, as shown by that decree, it was of a fixed and definite quantity of land, with its boundary on three sides fixed and established by the terms of the original grant and marked by the hand of nature as limited by the shores of the sea. It required to be surveyed for one purpose only—that of so fixing and establishing the boundary, which was left undetermined by the original grant, as to secure the given quantity, exclusive of that which was held by titles paramount within the natural boundaries so fixed and the survey so made. The patent was only evidence of the pre-existing title. (Waterman *vs.* Smith, 13 Cal., 419.) The only purpose of a survey was that of establishing the one undetermined line—the southern line—of the body of land to which the pre-existing title should attach.

In the case of this pueblo it undoubtedly became necessary, in order to secure quantity, to make a general survey of the whole and also a survey of the several parcels within the exterior boundaries which were confessedly held by adverse claimants holding under paramount title; but this necessity and power existed only for the purpose of ascertaining and determining the one undetermined and uncertain boundary line—that on the south. The right to make that survey and establish that boundary belonged to the political department of the Government, and could not be exercised by the courts; but the court could ascertain and fix the position of the natural boundaries which were designated in the grant, and did do so. While the courts could not and cannot interfere with the action of the political department of the Government in fixing the one boundary which was left undetermined by the grant as finally confirmed, they must determine whether the prior rights of third parties have been interfered with by the survey and patent issued thereon. While the survey and patent are conclusive upon the courts in actions of ejectment, they are so only when not in conflict with the prior rights of third persons, and in such actions their inconclusiveness can be asserted to the extent essential for the protection of such prior rights. (Moore *vs.* Wilkinson, *id.*, 486.)

The patent, so far as it is construed as a conveyance, is to be construed only as a quitclaim releasing to the patentee such interest as the United States possessed in the land conveyed by the original grant, and it takes effect by relation at the time when the proceedings were originally instituted before the board of land commissioners for the confirmation thereof. As a record of the Government it is evidence that the claim asserted was valid under the laws of Mexico (Yates *vs.* Smith, 38 Cal., 71), but it is valid as such record only to the extent that it conforms to the decree of the judicial department of the Government in reference to those matters upon which the judicial department were empowered to decide—that is to say, the decree of confirmation with reference to the fixed natural boundaries and to the survey made by the political or ministerial department establishing the only boundary which was not fixed and

determined by the decree of confirmation. As a deed it can convey nothing which the Government had not the power to grant or confirm at the date of filing the petition for confirmation. (See Doolan *vs.* Carr, cited by Mr. Justice Paterson, and cases therein cited.) It certainly could convey nothing which was not at that time vested and never afterward became vested in the United States, and this question may be inquired into upon collateral attack in an action of ejectment.

In Smelting Company *vs.* Kemp (104 U. S., 614) the Supreme Court of the United States, in passing upon this question of collateral attack upon a patent in an action of ejectment, says: "If they (the lands embraced in the patent) never were public property or had previously been disposed of, or if Congress had made no provision for their sale or had reserved them, the Department would have no jurisdiction to transfer them, and its attempted conveyance of them would be inoperative and void, no matter with what seeming regularity the forms of law may have been observed. The action of the Department would in that event be like that of any other special tribunal not having jurisdiction of a case which it had assumed to decide. Matters of this kind disclosing a want of jurisdiction may be considered by a court of law. In such case the objection to the patent reaches beyond the action of the special tribunal and goes to the existence of a subject upon which it was competent to act."

In the later case of Wright *vs.* Roseberry (121 U. S., 519) the same court again considers the question, and not only quotes and approves the foregoing, but also the following passage: "A patent may be collaterally impeached in any action and its operation as a conveyance defeated by showing that the Department had no jurisdiction to dispose of the lands—that is, that the law did not provide for selling them, or that they had been reserved from sale or dedicated to special purposes or had been previously transferred to others. In establishing any of these particulars the judgment of the Department upon matters properly before it is not assailed, nor is the regularity of its proceedings called into question, but its authority to act at all is denied and shown never to have existed."

And still later, in Doolan *vs.* Carr (125 U. S., 618), *supra*, the same court again says: "A patent may be collaterally impeached in any action and its operation as a conveyance defeated by showing that the Department had no jurisdiction to dispose of the lands, * * * or that they had been previously transferred to others."

In view of these recent and oft-repeated decisions of the court of last resort to which the question can be carried, there can no longer be a doubt about the right of the courts, even in actions of ejectment, when the parties present and rely, as in this case, upon a patent from the United States, to inquire as to whether or not the description given in the patent includes land which the Government or its officers had no power to convey.

This being so, then when the patent was offered in this case the plaintiff had a right to challenge its validity, not, perhaps, as to everything that it purported to convey, but as a conveyance of a

particular tract, for the recovery of which the action is brought, the ground that that tract was not embraced within the lands c ered by the grant which the patent was intended to evidence, a was not on land — which the Government or its officers had t power to make valid conveyance. Being so challenged, it is fou and conceded that the land lies not on or near the southern boun ary of the four leagues for which the grant is confirmed—the on boundary within the ministerial officers of the Government we required, authorized, or empowered to establish—but midway b tween the northern and southern extremities of said four leagu and near to but outside of the eastern boundary thereof as sa boundary had been fixed and established by the laws of the natio making the grant, and found and confirmed by the judicial depar ment of the Government in its decree of confirmation.

Was it outside of that boundary? It is found and at the argu ment admitted to be below ordinary high-water mark, in a navig ble arm of the Bay of San Francisco. If so, it was outside th boundary line of the grant under the laws of the country by whic the grant was made. Under the laws of that country these land below ordinary high-water mark constituted the beach *it* sea shore and "with respect to the ownership o pertains to the nation which is mistress of the country of which it forms a part, and, with respect to use, to all men." (Leyes 3, p. 6, tit. 28, part 3.) The king could not alienate such lands. (See New Orleans *vs.* United States, 10 Peters, 726, and other authorities cited by Mr. Justice Paterson.) That the Government did not alienate them is established by the decree of confirmation quoted in the former opinion, by which de cree it is expressly declared that the lands so granted and of which confirmation is decreed are bounded on the "north and the east by the Bay of San Francisco and on the west by the Pacific Ocean." That the ministerial officers of the Government were bound by the description given in that decree, so far as the decree did give definitive boundaries, and had no right to include in the patent lands outside of such boundaries, is abundantly established by the authorities cited by Justice Paterson in his opinion.

Again, the land in dispute was not land which the Government had the power to grant at the date of the filing of the petition for confirmation. Not having been granted by the Mexican Government before the conquest, it remained the property of the sovereign. The petition for confirmation was not filed until long after the admission of California into the Union. Immediately upon such admission the State by virtue of her sovereignty became seized of the land, the same being tide land of the Bay of San Francisco. The land did not, therefore, belong to the United States, and even Congress had no power to grant it to another. *Quoad* this land, the patent is absolutely void, for the reason given in Lessee *vs.* Wendell (9 Cranch, 87), cited on behalf of the appellant. The government in whose behalf the patent was issued had no title to the thing granted.

It is claimed on behalf of appellant that the doctrine of *stare decisis* should be applied to this case, and that, when so applied, the question here involved is *res adjudicata* under the decision of this

court in People *vs.* San Francisco (75 Cal., 389). We do not think so. That case was decided on demurrer to a complaint which admitted on its face that the patent was in "due form of law," was based upon a survey certified to have been made in strict conformity with instructions of the Commissioner of the General Land Office, which instructions had been given under the directions of the Secretary of the Interior; was issued under the great seal of the United States, and purported, by virtue of the authority of said decree of confirmation and in pursuance thereof, to grant and convey to the city of San Francisco the land embraced and described in the plat and survey, and including the premises within the exterior boundaries thereof. (See page 393.) The decree itself is also copied in full into the opinion (see page 392), but did not there, as here, appear to have been a portion of the patent. It shows upon its face that the grant as confirmed was bounded on the east by a natural boundary, to wit, ordinary high-water mark of the Bay of San Francisco (as the same existed at the date of the conquest of the country, namely, the 7th of July, 1846). This decree has been accepted and become final, and settles the question for this and all other courts and for all other officers and tribunals as to what was included in the grant, so far as this eastern boundary was concerned. But the court on demurrer was bound to take as true the allegation of the complaint that the survey was made and patent issued "by virtue of the authority of said decree and in pursuance thereof," and that it did "grant and convey to the city of San Francisco the tract of land" embraced and described in said plat and survey, and "including the premises within the exterior boundaries thereof." Taking these allegations to be true, the bill being *quia timet*, affirmance of the judgment which has been rendered for defendant on the demurrer necessarily followed.

But it is insisted that the case did not go off upon the proposition that these allegations must be taken as true, but the court considered and determined the broad question of the conclusiveness of the patent as the same is here and now presented. This seems to have been the course pursued by the court, and it furnishes the strongest possible argument for refusing to accept the opinion then given as conclusive of the case at bar, for it was one not necessary to the decision of the case.

47 But disregarding that point, the court was not then convincing in its reasoning or happy in its selection of authorities in support thereof. Neither of the three recent decisions of the Supreme Court of the United States cited above, and referred to in the opinion of Mr. Justice Paterson, were cited by counsel or referred to by the court. It is hardly possible that the conclusion of the court in People *vs.* San Francisco as to the conclusiveness of the patent as a conveyance of land below ordinary high-water mark could have ever been reached if the attention of the court had been called to the cases of Smelting Company *vs.* Kemp, Wright *vs.* Roseberry, and Doolan *vs.* Carr, *supra*. In fact, the two later cases were decided after the briefs were filed in People *vs.* San Francisco.

One of the cases upon which the court rests its conclusion in Peo-

ordinary high-water mark, but salt marsh—lands above ordinary and below extraordinary high-water marks. Incidentally it was claimed and the supreme court held that in that case the boundary of the Mexican grant ran to ordinary low-water mark and that the foreshore having been granted by the Mexican Government at that point, the State took in subordination to the grant, and that her rights were postponed to and must abide the event of the action of the General Government in the settlement of that private land grant, and that the patent was conclusive of the fact that the land had so been granted by the former government. In that case, also, the survey was one approved by the judicial department of the government. Here the Government, through its judicial department, has determined that the lands below ordinary high water mark were not included in the grant, and directed that the survey be made accordingly. Not being so included, and the court having so decreed, it follows that the rights of the State were not subordinate to or postponed to the settlement of the grant to the pueblo.

The same may be said of Ward *vs.* Mulford (32 Cal., 365), also cited in support of that decision. It was almost on all fours with Teschmacher *vs.* Thompson, and was decided on the authority of that case. In that case, as in the other, both the grant and the survey thereof had been confirmed by the judicial department of the Government and included the salt marsh. The court properly held that where the Mexican Government had, before the conquest, granted those lands, the rights acquired by California by virtue of her sovereignty were subordinate to the grants so made. There is nothing in the conclusion reached now or on the former hearing of this case in bank in conflict with these authorities. The difference is found in the facts. There it was adjudged in and by the decree of confirmation that the lands in dispute had been granted by the Mexican Government before the conquest; here it has been adjudged and determined in and by the decree of confirmation that they had not been so granted. The adjudication in both cases is final.

The only remaining case cited in support of the opinion in People *vs.* San Francisco is that of Leese *vs.* Clark (18 Cal., 574, and 20 *id.*, 425). All that was decided in that case bearing upon the case at bar was that "the defendants, taking whatever interest they possess in subordination to the future action of the Government * * * in determining the location of the older grant, are in no position to question these proceedings," and that "the term third persons refers not to all persons other than the United States and the claimants, but to those holding independent titles arising previous to the acquisition of the country." Both of these propositions may be accepted as true, but they do not militate against the view we have taken of this case. The plaintiffs in this case, it is true, do not claim by virtue of an older grant from the Mexican Government. What they claim is that the *locus in quo* was never granted, and under its laws could not have been granted by the ministerial officers of the government of Mexico; that this fact is established not only by reference to the laws of Mexico, but also by the final adjudication of the courts of the United States in and by the decree of confirmation of

the grant which was made; that not having been granted it remained, at the date of the conquest, the property of the nation, and passed as such to the United States; that the United States having made no grant thereof, upon the admission of California into the Union, September 9th, 1850, it became the property of the State by virtue of her sovereignty, and the United States could not thereafter make a valid grant thereof. The State did not take in subordination to the older grant and her rights were not postponed until the settlement of the rights of the older grantee, for there was no older grant in any manner affecting the property, none which included it even within its exterior boundaries; and on all the authorities this conclusion seems to be correct.

Teschmacher *vs.* Thompson and Ward *vs.* Mulford may be accepted as authority for the proposition that the Mexican Government could and sometimes did make grants covering the salt marsh lying between the high lands and the seashore—the lands between the high-water mark of extraordinary tides at the full of the moon or spring tides and the ordinary high-water mark of the tides in their daily ebb and flow, and even sometimes extended the grant below ordinary high-water mark; but that fact does not prove that she could or ever did make grants of lands lying on the seashore below the ordinary high-water mark of the daily ebb and flow of the tides within the boundaries of a pueblo. In People *vs.* San Francisco the court says: "No authority has been cited in support of the statement that by the laws of Mexico tide lands could not be included within pueblo lands." That may have been true, but the court failed to mark the distinction between "tide lands" and "seashore," between lands made productive by the occasional overflow of the tides and lands made barren by the regular and daily overflow thereof. Of the one it had before it two examples of the fact, established by decree of the Federal Courts, that the Mexican Government could and sometimes did grant them; of the other no example has ever been furnished where the government made such a grant. That it did not make a grant of such lands in this case is attested by the decree of confirmation. In support of the proposition that a pueblo could not own land below ordinary high-water mark the court was then cited to, and we again cite, Dwinelle's Colonial History of San Francisco, addend., 42; Wheeler's Land Titles of San Francisco, 13; Civ. Code of Mexico, art. 802; Domat, Book 7, tit. 8, sec. 1, art. 1; Hall's Mexican Law, sec. 1466; New Orleans *vs.* United States, 10 Pet., 662; Mayor *vs.* Maynow, 1 Mart., 207; Milne *vs.* Girodeau, 12 La., 324.

There being no grant to which the rights of the State were subordinate and to the settlement of which the rights of the State were postponed, she became vested with the title immediately upon her admission into the Union. Thereafter there was no power in the Government of the United States to make a grant of the land, and the act of its ministerial officers in including it within the survey and patent of a grant theretofore made was in excess of their jurisdiction, in violation of the decree of confirmation, and void. The patent, so far as these lands were concerned, was in effect but the

execution of the decree of confirmation. (United States *vs.* Minor, 114 U. S., 242.) "When a decree gives the boundaries of a tract to which the claim is confirmed with precision and has become final it is conclusive not only on the question of title, but also as to the boundaries which it specifies." (United States *vs.* Hancock, 133 U. S., 196.) And it was the duty of the surveyor in making survey of the claim finally confirmed to "follow the decree of confirmation as closely as practicable whenever (and wherever) such decree designates the specific boundaries of the claim." (*Id.* and sec. 7 of the act of Congress of July 1, 1864—13 Stat., 334.)

Surely if a ministerial officer, in executing a decree which fixes specific boundaries, includes land excluded by the decree from those boundaries, his act can have no force or validity as a conveyance, and especially so if the party executing the conveyance has no title.

As in Jones *vs.* Martin (13 Sawyer, 317) so here, the meander line down the coast was necessary for the purpose of ascertaining quantity, "but when done it was the shore line as fixed by nature and shown upon the ground and not the meander line as run by the surveyor that determined the boundary of the grant."

But there is still another aspect in which this case may be viewed. We have spoken of the rights of this pueblo as a pre-existing title.

That pre-existing title was never a fee under the Mexican law. A grant to a pueblo was not "a private land grant" in the sense which took title out of the State. It was the mere vesting in the pueblo, a political subdivision of the State, of the use of the land in trust for the benefit of the inhabitants thereof, and with power, as the representative of the State, to make grants which should vest title in private ownership of solares, or house lots, and suertes, or sowing lots, to settlers; the remainder to remain vacant to the end that gifts thereof might be made to new settlers. These grants, as they are generally called, did not deprive the State itself of the right, at any subsequent period, of making what are technically denominated "private land grants," vesting title in natural persons of any portion of the lands lying within the four leagues of the pueblo which had not already passed into private ownership; and this power on the part of the State was not unfrequently used. It was notably so used in several instances within the pueblo of San Francisco, and the grants so made by the State within the pueblo have been recognized and confirmed; and, as hereinbefore shown, the power of the pueblo to make grants that should vest title in private ownership, unlike that of the State, did not extend to that of making grants upon the seashore. The fee of all the land (which had not passed into private ownership) remained always in the Government, and that upon the seashore was unincumbered by the trust or power conferred upon the pueblo. The result was that upon the conquest all the property upon this peninsula which had not already passed into private ownership became part of the public domain of the United States and subject to the same laws as affected other portions of the public domain; but in executing or carrying out the provisions of the treaty of Guadaloupe Hidalgo our Government added the features of our own town-site laws, saw fit to

vest in the successor of the pueblo the fee of that over which before the pueblo had exercised power only as the agent of the sovereign. The land thus became subject to the combined trusts created by the Mexican law relating to pueblos and the American law relating to town sites. In this sense and this only the patent from the United States became a grant, but as such it could convey nothing which had at the conquest become a part of the public domain, unincumbered with the trust resting in the pueblo; and, being so, a portion of the public domain unaffected as aforesaid had by the laws of the United States passed out of the Federal Government before the making of the patent.

It is claimed on behalf of appellant that quantity was the controlling element in the decree of confirmation. It is enough to say that while quantity was required, and the claimant was entitled to quantity, it was no more controlling than the natural boundaries on the north, east, and west fixed by the decree, and the decree itself gave leave to go south for quantity; but it did not give leave to go north, east, or west for quantity, even if the Government had possessed lands of its own in those directions which it had power to appropriate to make up quantity.

In view of what was said in the former opinion, which this is not intended either to supersede or modify, but merely to supplement, it does not seem necessary to further extend this discussion. After a careful review of all the authorities cited and arguments made we still adhere to the conclusion reached in said former opinion in bank that the judgment of the court below must be affirmed.

So ordered.

FOX, *J.*

We concur.

SHARPSTEIN, *J.*
PATERSON, *J.*

Concurring Opinion.

In whatever point of view this case may be regarded I am of opinion that the evidence was admissible to show that the land in controversy was situated below the ordinary high-water mark of the Bay of San Francisco as it existed on the 7th day of July, 1846.

Whatever the right of the pueblo was to the land, for which confirmation was sought by the city of San Francisco, was never held to extend below the ordinary high-water mark of the bay. It was so adjudged by the decree of confirmation entered in May, 1865. The act of Congress of March 3, 1865, ratified the decree as it was made and entered.

If there was no judicial determination binding on the State fixing a different boundary from that of high-water mark as determined by the decree the evidence above referred to, in my judgment, was clearly admissible. As the decree adjudges to the city nothing beyond high-water mark, evidence was admissible to locate this line so as to show that the land sued for was outside of that line.

In my opinion the patent which sets forth the decree shows no different determination as to this line from that set forth in the de-

cree itself. The patent shows the only other determination insisted on; and this, when rightly construed, does not vary from the decree. To rightly construe the patent the whole of it must be taken into view, and, regarding all its parts, high-water mark should be held to be the controlling call to which course and distance must yield. The patent is but the execution of the decree. (United States *vs.* Minor, 114 U. S. Reps., 241–242.) The survey and the patent are made to carry out its provisions. The maxim that public officers are presumed to do their duty comes in aid of the view that the line of high-water mark is the controlling call. The officers who made the survey and issued the patent should not be presumed to have gone beyond the decree which they were to carry out, if it can be justly held that their acts show that they are consistent with its requirements. (See More *vs.* Massini, 32 Cal., 432–436; and Jones *vs.* Martin, 13 Saw. Cir. Ct. Reps., 317.)

I adhere to my concurrence in the opinion of Justice Paterson, delivered on the previous hearing of this case, and will add that I perceive nothing in the opinion of Justice Fox inconsistent with the opinion of Justice Paterson. With these views I must hold that the judgment should be affirmed.

THORNTON, *J.*

48 *Dissenting Opinion.*

I dissent. I could not express my views of the question involved in an original opinion as satisfactorily to myself, and certainly not as satisfactorily to others, as they are expressed in the deliberate opinion of this court delivered by Mr. Justice McKinstry in the recent case of *People vs.* San Francisco (77 Cal., 355). The reasoning of that opinion and the authorities therein cited are, to my mind, unanswerable and conclusive. It is said that in that opinion the court was not happy in its selection of authorities, and that it ought to have been controlled by Doolan *vs.* Carr (125 U. S.), Wright *vs.* Roseberry (121 U. S.), and Smelting Co. *vs.* Kemp (104 U. S., Otto); but it happens that all the authorities cited in People *vs.* San Francisco dealt with the very matters involved in this case—that is, with rights claimed under Mexican grants, with the conclusiveness of United States surveys and patents in such cases, and with powers exercised under the act of March 3, 1851, and subsequent acts to ascertain and settle such claims in the State of California. On the other hand, Doolan *vs.* Carr merely decides that the United States land department has no power to issue a patent to a railroad company for land as "public land" which lies within a Mexican grant. Wright *vs.* Roseberry merely decides that when land has been segregated and identified as swamp land a United States patent issued for it afterward is worthless; and as to Smelting Company *vs.* Kemp, it merely holds that a patent to a mining claim cannot be attacked collaterally in a court of law. I cannot possibly see how any of these cases have any bearing whatever on the power of the United States Government under the treaty with the Mexican Government to determine the rights of land claimants under the latter government by any methods and through any tribunals which she may

choose to adopt for that purpose. As to any rights which the State of California had at the time of that treaty, it is sufficient to say that she had not then been born.

Moreover, the case of People *vs.* San Francisco was decided after the fullest argument and consideration, having been heard twice, and, as it established a rule of property, it is a case to which, in my judgment, the rule of *stare decises* should be strictly applied. I think, therefore, that the judgment in the case at bar should be reversed.

McFARLAND, *J.*

We concur in the dissenting opinion of Justice McFarland.

BEATTY, *C. J.*
WORKS, *J.*

49 *Security on Writ of Error.*

In the Supreme Court of the United States.

THOMAS KNIGHT, Pl'ff in Error,
vs.
UNITED LAND ASSOCIATION and CLINTON C. TRIPP, Def'ts in Error.

Know all men by these presents that whereas a writ of error has been allowed by the chief justice of the supreme court of the State of California, and said writ of error has been issued accordingly, for the purpose of having reviewed the alleged errors committed by the said supreme court in the matter of its decision rendered in that certain cause wherein said United Land Association and Clinton C. Tripp were plaintiffs and respondents and said Thomas Knight was defendant and appellant, which said cause is numbered in said court 12748;

And whereas a citation on said writ of error has been signed
50 by said chief justice:

Now, therefore, in consideration of the premises, we, the undersigned, do hereby, jointly and severally, undertake and promise on the part of the said Thomas Knight, plaintiff in error, that the said plaintiff in error shall prosecute his said writ to effect, and if he fail to make his plea good that he shall answer all damages and costs not exceeding the sum of one thousand dollars, in lawful money of the United States; for the payment of which amount we acknowledge ourselves jointly and severally bound.

THOS. B. BISHOP. [SEAL.]
JNO. R. JARBOE. [SEAL.]

Witness to signatures:
E. R. TAYLOR.

The foregoing security is hereby approved this 12th day of September, A. D. 1890.

W. H. BEATTY,
Chief Justice of the Supreme Court of the State of California.

Endorsed: 12748. In the Supreme Court of the United States. Thomas Kight, pl'ff in error, *vs.* United Land Association *et al.*, def'ts in error. Security on writ of error. Filed Sept. 12, 1890. J. D. Spencer, clerk; Frank Myers, deputy.

51 *Citation.*

UNITED STATES OF AMERICA, *ss:*

To United Land Association and Clinton C. Tripp, Greeting:

You are hereby cited and admonished to be and appear at the Supreme Court of the United States to be held at the city of Washington, in the District of Columbia, on the thirteenth day of October, A. D. 1890, pursuant to a writ of error, which has been allowed and filed in the office of the clerk of the supreme court of the State of California, wherein Thomas Knight is plaintiff in error and you are defendants in error, to show cause, if any there be, why the judgment in said writ of error mentioned should not be corrected and speedy justice should not be done to the parties in that behalf.

Witness the Honorable W. H. Beatty, chief justice of the supreme court of the State of California, this 12th day of September, A. D. 1890, and of the Independence of the United States the one hundred and fifteenth.

[SEAL.]

W. H. BEATTY,
Chief Justice of the Supreme Court of California.

Attest: J. D. SPENCER, *Clerk*,
By FRANK MYERS, *Deputy.*

52 Service of the within citation is hereby admitted this twelfth day of September, 1890.

PHILIP G. GALPIN,
Att'y for Defendants in Error.

Endorsed: 12748. In the Supreme Court of the United States. Thomas Knight, pl'ff in error, *vs.* United Land Association *et al.*, def'ts in error. Citation. Filed Sept. 12, 1890. J. D. Spencer, clerk; Frank Myers, deputy.

53 In the Supreme Court of the United States.

THOMAS KNIGHT, Pl'ff in Error,
vs.
UNITED LAND ASSOCIATION and CLINTON C. TRIPP, Def'ts in Error.

Assignment of Errors.

Now comes plaintiff in error (defendant in the court below) and respectfully shows and represents that manifest error appears on the face of the record in this cause in the following particulars, to wit:

1st. That according to the law of the land the judgment should

have been against the plaintiffs (defendants in error herein), and that the judgment of the trial court should have been reversed, with directions to enter a judgment on the findings in favor of the defendant (plaintiff in error herein).

54 2d. That it appears from the findings in the case that each and every of the conclusions of law are erroneous, and that each and every of said conclusions of law are not legally deducible from the findings of facts.

3d. That it appears from said findings of facts that the title of the plaintiff in error herein was and is paramount to that of defendant in error herein.

4th. That it appears from the record in this cause that the right and title of plaintiff in error was derived from and under the city and county of San Francisco as the successor of the pueblo of San Francisco; that said city as such successor was entitled to four square leagues of land to be set off from the upper portion of the peninsula of San Francisco, and which said land was bounded on the north and east by the waters of the Bay of San Francisco, on the west by the Pacific Ocean, and on the south by a due east and west

55 line so run as to include an area of four square leagues; that said pueblo derived its said land from the Republic of Mexico, and that the right to the same was protected and guaranteed by the treaty between the said Republic and the United States, known as the treaty of Guadalupe Hidalgo; that said United States, for the purpose of protecting said right, if it existed, examined into the same by officers duly appointed for that purpose, and that said officers, after such examination, determined and held that said city was entitled to said four square leagues of land bounded as aforesaid, and that thereafter said officers located said land by official survey, and that after such location the said United States, by their President, duly issued letters patent to said city, its successors and assigns, for the whole of said land; that the land in controversy, and which is claimed under said right by plaintiff in error, is situated within the lines of said survey and patent.

56 That the defendants in error claim said lands by deed from the State of California, and that it appears from said record and from the foregoing statement under this assignment of error that the right and title of defendants in error and of said State under whom they claim were and are subordinate to that of said city and of plaintiff in error.

5th. That the trial court and the supreme court of the said State erred in holding and ruling that parol evidence was admissible for the purpose of determining the location of the north and east boundary line of said pueblo land.

6th. That said courts erred in holding and ruling that said boundary line as established by said patent could be varied by parol evidence.

7th. That said courts erred in holding and ruling that said boundary line could be shown to be elsewhere than as finally laid down in said survey and patent.

57 8th. That said courts erred in holding and ruling that

said patent was not conclusive as to the boundaries of said pueblo land.

9th. That said courts erred in holding and ruling that the decree of the United States circuit court confirming the right of said city to said pueblo land could be looked into for the purpose of determining the location of the said boundary line, said patent having been issued in pursuance of said decree and for the purpose of definitely making out and determining the precise boundaries of the land described in said decree.

10th. That said courts erred in holding and ruling that the State of California was not concluded by said patent.

11th. That said courts erred in holding and ruling that defendants in error herein were not concluded by said patent.

12th. That said courts erred in holding and ruling that
58 the final survey of said pueblo land on which said patent was issued was not a legal and authorized survey.

13th. That said courts erred in holding and ruling that any survey of said pueblo land made prior to the issuance of said patent, other than the survey on which said patent is based, was legally examinable for the purpose of determining the location of said pueblo land.

14th. That said trial court erred in admitting in evidence the decision of Commissioner Williamson, dated November 11th, 1878, and said supreme court erred in affirming the ruling of said trial court in that regard.

15th. That said trial court erred in admitting in evidence the map made by Butler in 1857 and the book of maps from the office of the city and county surveyor of San Francisco, and the map of the United States Coast Survey made in 1857 and the map
59 of the United States Coast Survey made in 1859 by Captain Palmer, and the map made by R. P. Bridgens, civil engineer, and said supreme court erred in affirming the rulings of said trial court in that regard.

16th. That the trial court erred in admitting in evidence the minute book of the board of supervisors of the city and county of San Francisco and in permitting to be read therefrom a resolution of said board passed on the 23d day of December, 1878: "That no appeal be taken from the decision on said survey of J. A. Williamson;" and said supreme court erred in affirming said ruling of said trial court.

17th. That the trial court erred in admitting in evidence the two deeds from the board of State tide land commissioners to George W. Ellis, under which defendants in error claim, and said supreme court erred in affirming said ruling of said trial court.

18th. That said trial court erred in admitting in evidence
60 the survey of said pueblo land made by Surveyor Stratton in the years 1867 and 1868; which said survey is mentioned in finding XII of the findings of fact herein, and said supreme court erred in affirming said ruling of said trial court.

19th. That the trial court erred in admitting in evidence the certificate of approval of Surveyor General Upson of the field-notes of

said Stratton survey, and said supreme court erred in affirming said ruling of said trial court.

20th. That the trial court erred in permitting the witness George Turner to testify as to the location of the line of ordinary high water on the premises in controversy and as to the navigability of Mission creek, and said supreme court erred in affirming said rulings of said *supreme* court.

21st. That said court erred in holding and ruling that any of the testimony of said George Turner was admissible.

61 22d. That the first conclusion of law of the findings of the trial court is erroneous, and that said supreme court erred in holding it to be correct.

23d. That the second conclusion of law of the findings of the trial court is erroneous, and that said supreme court erred in holding it to be correct.

24th. That the third conclusion of law of the findings of the trial court is erroneous, and that said supreme court erred in holding it to be correct.

25th. That the fourth conclusion of law of the findings of the trial court is erroneous, and that said supreme court erred in holding it to be correct.

26th. That the fifth conclusion of law of the findings of the trial court is erroneous, and that said supreme court erred in holding it to be correct.

62 & 63 27th. That the trial court erred in refusing to find for defendant (plaintiff in error herein) after admitting in evidence the said patent and the final survey on which it was based, and said supreme court erred in affirming said ruling of said trial court.

Wherefore plaintiff in error prays that the judgment of the said supreme court rendered against him in this cause on the fourth day of September, A. D. 1890, be reversed, and that judgment be ordered to be entered in his favor on the findings.

JAMES. A. WAYMIRE,
Attorney for Plaintiff in Error.

SAMUEL M. WILSON,
EDWARD R. TAYLOR,
Of Counsel for Plaintiff in Error.

63½ [Endorsed:] No. 12748. Supreme Court of the United States. Thomas Knight, pl'ff in error, *vs.* United Land Association *et al.*, def't in error. Assignment of errors.

Endorsed: Filed Sept. 19, 1890. J. D. Spencer, clerk, by Ben. M. Maddox, deputy.

64 UNITED STATES OF AMERICA, *ss:*

The President of the United States of America to the honorable the judges of the supreme court of the State of California, Greeting:

Because in the record and proceedings, and also in the rendition of the judgment of a plea which is in the said supreme court of the State of California, before you, being the highest court of law or

equity in the said State in which a decision could be had in the said suit between United Land Association and Clinton C. Tripp, plaintiffs and respondents in the said supreme court of the State of California, and Thomas Knight, defendant and appellant in the said supreme court of the State of California, wherein were specially set up and claimed by the said Thomas Knight, defendant and appellant, a title and right under a certain treaty between the United States of America and the Republic of Mexico, commonly known and designated as the treaty of Guadalupe Hidalgo, and under a statute of the United States, and the decision was against the said right, title, and privilege, a manifest error hath happened, to the great damage of the said Thomas Knight, as by his complaint appears, and it being fit that the error, if any there hath been, should be duly corrected and full and speedy justice done to the
65 parties aforesaid in this behalf, you are hereby commanded, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same at the city of Washington, in the District of Columbia, on the second Monday of October next, in the said Supreme Court of the United States to be then and there held, that, the record of proceedings aforesaid being inspected, the said Supreme Court of the United States may cause further to be done therein to correct that error what of right and according to the laws and customs of the United States should be done.

Witness the Honorable Melville W. Fuller, Chief Justice of the Supreme Court of the United States, this twelfth day of September, in the year of our Lord one thousand eight hundred and ninety, and of the Independence of the United States the one hundred and fifteenth.

[Seal U. S. Circuit Court, Northern Dist. Cal.]

L. S. B. SAWYER,
Clerk of the United States Circuit Court,
Northern District of California.

The above writ of error is hereby allowed.

W. H. BEATTY,
Chief Justice of the Supreme Court of the State of California.

66 [Endorsed:] 12748. In the Supreme Court of the United States. Thomas Knight, pl'ff in error, *vs.* United Land Association and Clinton C. Tripp, def'ts in error. Writ of error. Filed Sept. 12, 1890. J. D. Spencer, clerk, by Frank Myers, deputy.

67 *Clerk's Certificate.*

In the Supreme Court of the State of California.

THOMAS KNIGHT, Plaintiff in Error,
vs.
UNITED LAND ASSOCIATION and CLINTON C. TRIPP, Defendants in Error. } No. 12748.

I, J. D. Spencer, clerk of the supreme court of the State of California, do hereby certify that the foregoing sixty-two pages, numbered from one to sixty-two, both numbers inclusive, contain a full, true, and correct transcript of the proceedings in the case above entitled, and that the same together constitute the return to the annexed writ of error.

And I further certify that at the time said writ of error was filed in the office of the clerk of said court the plaintiff in error lodged with me, as clerk of said court, in said office, a copy of said writ of error for each of the defendants in error in said cause.

Seal Supreme Court of California.

Witness my hand and the seal of the said supreme court this 22nd day of September, 1890.

J. D. SPENCER, *Clerk*,
By J. J. PAULSELL,
Deputy Clerk.

Endorsed on cover: California supreme court. No. 1348. Thomas Knight, plaintiff in error, *vs.* The United Land Association and Clinton C. Tripp. Filed October 6, 1890.

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JAMES. H. McKENNEY,
CLERK.

In the Supreme Court of the United States.

OCTOBER TERM, 1891.

THOMAS KNIGHT,
Plaintiff in Error,

v.

THE UNITED LAND ASSOCIATION AND CLINTON C. TRIPP,
Defendants in Error.

Brief on Behalf of Plaintiff in Error.

SAMUEL M. WILSON,
EDWARD R. TAYLOR,
Counsel for Plaintiff in Error.

SAN FRANCISCO
W. A. Woodward & Co., Printers, 12 Sutter Street
1891

In the Supreme Court of the United States.

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IN THE

SUPREME COURT

OF THE

UNITED STATES.

OCTOBER TERM, 1891.

THOMAS KNIGHT,
Plaintiff in Error,

vs.

UNITED LAND ASSOCIATION
AND CLINTON C. TRIPP,
Defendants in Error.

Brief on Behalf of Plaintiff in Error.

STATEMENT.

Plaintiff in Error (defendant below) claiming title to a lot of land under the City of San Francisco as successor of the Pueblo of that name, was sued in ejectment by defendants in error (plaintiffs below) claiming title under the State of California, and was defeated in the action. The judgment of the Court below having

been affirmed by the Supreme Court of the State on the 9th of September, 1890, a Writ of Error was at once sued out by defendant, and a return made to the writ with such expedition that the record was filed in time to have the case take a place on the docket of the last term of the Court. At that term, on motion of plaintiff in error, the cause was advanced and set down for argument on the 19th of October of the present year.

The question involved is, whether the State of California, can, by its Courts, in an action of ejectment, challenge the correctness of location of a Mexican Grant, as that location is evidenced by United States Patent; and whether it is permissible, as against the Patent lines, for the State to show by parol that those lines ought to be somewhere else than where they have been placed by the political department of the Federal Government in its execution of the treaty of Guadalupe Hidalgo.

The action was, on stipulation of the parties plaintiff and defendant, tried by a referee, and by referring to the Transcript of the Record, from pages 4 to 8, it will be seen that the referee permitted, as against the objections of defendant, evidence to be introduced tending to show where ordinary high water mark was in 1853, and at other times subsequent thereto; and on this evidence, and the proceedings before the Land Commission prosecuted by the City of San Francisco to secure the Pueblo Land to which she was finally held to be entitled, and on a survey of this land which

was rejected by the Secretary of the Interior, and a deed from the State of California to grantors of defendants in error, the latter rested their case.

As a part of plaintiff's case, the plat of the aforesaid survey which was made by Stratton was introduced in evidence, and a copy of this plat is made a part of the Transcript of Record.

As against the case made by plaintiffs (defendants in error) defendant Knight relied on the final survey of the Pueblo Lands of San Francisco made by Von Leicht, and the patent of the United States issued in accordance with that survey.

By the Stratton survey the lands in controversy are excluded from the Pueblo, while by the Von Leicht survey and patent they are included within it. Plaintiff in error derives title under the City, while defendants in error claim under the State, basing their claim upon the asserted fact that the lands are tide lands, and as such were improperly included within the Pueblo boundaries by the Von Leicht survey and patent.

The final decree which determined the boundaries of the Pueblo Land to which the City of San Francisco, as successor of the Pueblo of that name, was held to be entitled, is set out in the findings of the referee (Fol. 25 of Transcript of Record), and is as follows:

"*The City of San Francisco* v. *The United States.*' The appeal in this case taken by the petitioner, the City of San Francisco, from the decree of the Board of Land Commissioners, to ascertain and settle private land claims in the State of California, entered on the twenty-first day of December, 1854, by which the claim of the petitioner was adjudged to be valid, and confirmed to lands within certain described limits, coming on to be heard upon the transcript of proceedings and

decision of said Board, and the papers and evidence upon which said decision was founded, and further evidence taken in the District Court of the United States for the Northern District of California, pending said appeal—the said case having been transferred to this Court by order of the said District Court, under the provisions of section four of the Act entitled, "An Act to expedite the settlement of titles to lands in the State of California," approved July 1, 1864—and counsel of the United States and for the petitioner having been heard, and due deliberation had, it is ordered, adjudged and decreed that the claim of the petitioner, the City of San Francisco, to the land hereinafter described, is valid, and that it be confirmed.

"The land of which confirmation is made is a tract situated within the County of San Francisco, and embracing so much of the extreme upper portion of the peninsula above ordinary high water mark (as the same existed at the date of the conquest of the country, namely, the seventh day of July, A. D. 1846), on which the City of San Francisco is situated, as will contain an area of four square leagues—said tract being bounded on the north and east by the bay of San Francisco, on the west by the Pacific Ocean, and on the south by a due east and west line drawn so as to include the area aforesaid, subject to the following deductions: Such parcels of land as have been heretofore reserved or dedicated to public uses by the United States; and also such parcels of land as have been by grants from lawful authority vested in private proprietorship, and have been finally confirmed to parties claiming under said grants, by the tribunals of the United States, or shall hereafter be finally confirmed to parties claiming thereunder by said tribunals in proceedings now pending therein for that purpose; all of which said excepted parcels of land are included within the area of four square leagues above-mentioned, but are excluded from the confirmation to the city. This confirmation is in trust for the benefit of the lot-holders under grants from the pueblo, town, or City of San Francisco, or other competent authority, and as to any residue, in trust for the use and benefit of the inhabitants of the city.

"FIELD, Circuit Judge."

"San Francisco, May 18, 1865."

The findings set out at length the Patent of the United States, as well as other matters (some of which are rather startling in view of the history of the case as made in the Land Office at Washington), and as

conclusions of law, the deduction is, that the State title is paramount to the City title. We on our side claim that those conclusions of law are erroneous, and that this Court, on the Findings of Fact made, should send the case back with directions to enter a judgment in favor of plaintiff in error.

Errors Assigned.

The Assignment of Errors, with prayer for reversal, was made a part of the return to the Writ of Error, and can be found in the Transcript of Record from Fol. 53 to 63, and we here reproduce it, leaving off the prayer for reversal:

"Now comes plaintiff in error (defendant in the Court below) and respectfully shows and represents that manifest error appears on the face of the record in this cause in the following particulars, to wit:

"1st. That according to the law of the land the judgment should have been against the plaintiffs (defendants in error herein), and that the judgment of the Trial Court should have been reversed with directions to enter a judgment on the findings in favor of the defendant (plaintiff in error herein).

"2d. That it appears from the findings in the case that each and every of the conclusions of law are erroneous, and that each and every of said conclusions of law are not legally deducible from the Findings of Facts.

"3d. That it appears from said Findings of Facts that the title of plaintiff in error herein was and is paramount to that of defendant in error herein.

"4th. That it appears from the record in this cause that the right and title of plaintiff in error was derived from and under the City of San Francisco as the successor of the Pueblo of San Francisco; that said city as such successor was entitled to four square leagues of land to be set off from the upper portion of the peninsula of San Francisco, and which said land was bounded on the north and east by the waters of the bay of San Francisco, on the west by the Pacific Ocean, and on the south by a due east and west line so run as to include an area of four square leagues; that said Pueblo derived its said land from the Republic of Mexico, and that the right to the same was protected and guaranteed by the treaty between the said Republic and the United States known as the treaty of Guadalupe Hidalgo; that said United States, for the purpose of protecting said right, if it existed, examined into the same by officers duly appointed for that purpose, and that said officers, after such examination, determined and held that said city was entitled to said four square leagues of land bounded as aforesaid; and that thereafter said officers located said land by official survey, and that after such location the said United States by their President duly issued letters patent to said city, its successors and assigns, for the whole of said land; that the land in controversy and which is claimed under said right by plaintiff in error is situated within the lines of said survey and patent; that the defendant in error claims said land by deed from the State of California, and that it appears from said record

and from the foregoing statement under this assignment of error, that the right and title of defendants in error and of said State under whom they claim, were and are subordinate to that of said city and of plaintiff in error.

"5th. That the Trial Court and the Supreme Court of the said State erred in holding and ruling that parol evidence was admissible for the purpose of determining the location of the north and east boundary line of said Pueblo Land.

"6th. That said Courts erred in holding and ruling that said boundary line as established by said patent could be varied by parol evidence.

"7th. That said Courts erred in holding and ruling that said boundary line could be shown to be elsewhere than as finally laid down in said survey and patent.

"8th. That said Courts erred in holding and ruling that said patent was not conclusive as to the boundaries of said Pueblo Land.

"9th. That said Courts erred in holding and ruling that the decree of the United States Circuit Court confirming the right of said city to said Pueblo Land could be looked into for the purpose of determining the location of the said boundary line, said patent having been issued in pursuance of said decree, and for the purpose of definitely marking out and determining the precise boundaries of the land described in said decree.

"10th. That said Courts erred in holding and ruling that the State of California was not concluded by said patent.

"11th. That said Courts erred in holding and ruling that defendants in error herein were not concluded by said patent.

"12th. That said Courts erred in holding and ruling that the final survey of said Pueblo Land, on which said patent was issued, was not a legal and authorized survey.

"13th. That said Courts erred in holding and ruling that any survey of said Pueblo Land made prior to the issuance of said patent, other than the survey on which said patent is based, was legally examinable for the purpose of determining the location of said Pueblo Land.

"14th. That said Trial Court erred in admitting in evidence the decision of Commissioner Williamson, dated Nov. 11, 1878, and said Supreme Court erred in affirming the ruling of said Trial Court in that regard.

"15th. That said Trial Court erred in admitting in evidence the map made by Butler in 1857, and the Book of Maps from the office of the C. and C. Survey of San Francisco, and the map of the United States Coast Survey made in 1857, and the map of the United States Coast Survey made in 1859 by Capt. Palmer, and the map made by R. P. Bridgens, civil engineer; and said Supreme Court erred in affirming the rulings of said Trial Court in that regard.

"16th. That the Trial Court erred in admitting in evidence the Minute Book of the Board of Supervisors of the City and County of San Francisco, and in

permitting to be read therefrom a resolution of said Board passed on the 23d day of December, 1878, 'That no appeal be taken from the decision on said survey of J. A. Williamson,' and said Supreme Court erred in affirming said ruling of said Trial Court.

"17th. That the Trial Court erred in admitting in evidence the two deeds from the Board of State Tide Land Commissioners to George W. Ellis, under which defendant in error claim, and said Supreme Court erred in affirming said ruling of said Trial Court.

"18th. That the Trial Court erred in admitting in evidence the survey of said Pueblo Land made by Surveyor Stratton in the years 1867 and 1868, which said survey is mentioned in Finding XII of the Findings of Fact herein, and said Supreme Court erred in affirming said ruling of said Trial Court.

"19th. That the Trial Court erred in admitting in evidence the certificate of appeal of Surveyor-General Upson of the field notes of said Stratton survey, and said Supreme Court erred in affirming said ruling of said Trial Court.

"20th. That the Trial Court erred in permitting the witness, George Turner, to testify as to the location of the line of ordinary high water on the premises in controversy, and as to the navigability of Mission Creek, and said Supreme Court erred in affirming said rulings of said Supreme [Superior] Court.

"21st. That said Courts erred in holding and ruling that any of the testimony of said George Turner was admissible.

"22d. That the first conclusion of law of the findings of the Trial Court is erroneous, and that said Superior Court erred in holding it to be correct.

"23d. That the second conclusion of law of the findings of the Trial Court is erroneous, and that said Supreme Court erred in holding it to be correct.

"24th. That the third conclusion of law of the findings of the Trial Court is erroneous, and that said Supreme Court erred in holding it to be correct.

"25th. That the fourth conclusion of law of the findings of the Trial Court is erroneous, and that said Supreme Court erred in holding it to be correct.

"26th. That the fifth conclusion of law of the findings of the Trial Court is erroneous, and that said Supreme Court erred in holding it to be correct.

"27th. That the Trial Court erred in refusing to find for defendant (plaintiff in error herein) after admitting in evidence the said patent and the final survey on which it was based, and said Supreme Court erred in affirming said ruling of said Trial Court."

Brief of the Argument.

I.

From what has gone before, it is evident that the question is squarely presented upon the record, as to whether, in an action of ejectment for lands within the boundaries of a pueblo grant protected by the treaty of Guadalupe Hidalgo, as those boundaries have been established by the Patent of the United States, title

derived from the State of California shall prevail over the title derived under such pueblo.

The question is also presented upon the record (conceding the jurisdiction of the State Courts to locate Mexican grants), as to whether the government of the United States did not properly locate the particular grant in question.

That such a question could be presented, at this day, for serious consideration by a Court of last resort, is one of the marvels of litigation; but not only has it been presented, and that seriously, but the Court to which the Writ of Error ran in this case has, as against numerous decisions of its own, held in such a way as to make us marvel whether anything in the law can ever be permanently settled.

The litigation over the boundaries of the Pueblo Lands of San Francisco lasted for many years in the Land Department; that Department gave to the controversy its best thought; three successive Secretaries of the Interior passed upon it, each one in turn holding against the State and in favor of the City; and in fact we have this Court, when speaking through Mr. Justice FIELD in *City* v. *LeRoy*, No. 878 of the last October Term, saying in regard to this very controversy over the Pueblo boundaries, that they were ascertained and fixed "after the most thorough and exhaustive "examination ever given to the consideration of the "boundaries of a claim of a pueblo under the Mexican "government." And now, after this long contest has terminated; after the political department of the Gen-

eral Government, specially deputed by the Constitution and Laws of the United States, has determined where the boundaries should be located, and in pursuance of such determination has located them and, as record thereof, has caused a patent to be issued to the City wherein these boundaries are designated, we are met with the proposition that nothing has in fact been determined, and that these boundaries can, in a collateral attack on the patent, be shown by parole, and that the State Courts have concurrent jurisdiction with the Executive Department of the General Government in the matter of locating land grants; and, indeed, that the decisions of that Department in the matter of such location are subject to be reviewed and set aside by those Courts. For all this follows necessarily from the decision of the State Supreme Court. It is simply begging the question to say that the United States Land Department had no jurisdiction to include within the Pueblo any land belonging to the State; *for the very question to be decided by that Department was as to the location of a line on one side of which should be State land and on the other side of which should be City land.* This was the precise and only question submitted to it, and of that question it had exclusive jurisdiction. Its final determination, therefore, as expressed in the patent, must be final. If by mistake, or by fraud, any land of the State has been included within the pueblo lines, that matter can be corrected in equity by a proper proceeding brought by the United States, in the name of

their Attorney-General. (*U. S.* v. *Miner*, 114 U. S., 233; *Maxwell Land Grant Case*, 121 U. S., 325.) And it must be kept in mind that no question is made as to the *subject matter* of the decree and survey. It is not contended that the Land Department assumed to survey any other four square leagues of land than the four square leagues set out in the decree, and this being so, jurisdiction was complete.

But even in a direct proceeding to set aside a patent on the ground of errors in the survey, the Courts are exceedingly cautious in interfering. In the Maxwell Grant Case, the strongest appeals were made to this Court to set aside the patent on this ground. The grant covered nearly two million acres, and nothing was left undone by those contesting it to work its overthrow, or at least to limit its operation by a new survey which should contain less quantity than that in the survey assailed. Yet the Court declined to interfere; and at page 387, Mr. Justice MILLER, speaking for the Court, uses the following language:

> "Without going into this evidence more minutely, we are content to say that, while in favor of the correctness of this survey, in the points assailed, it is as strong, or stronger than that for any other survey which would be made, or which has been suggested by the counsel for the United States, we are very clear that it is not the province of this Court to set aside and declare null and void these surveys and patents approved by the officers of the government whose duty it was to consider them, and who evidently did consider them with great attention, upon the mere possibility or a bare probability that some other survey would more accurately represent the terms of the grant."

The proceeding here was a *direct* one, brought by the United States, for the very purpose of doing what

is sought to be done in the case at bar in a collateral proceeding by the State of California; and yet we have the Court proclaiming that it would not interfere with the work of the Land Department whose "duty" it was to make the survey "represent the terms of the grant."

The Pueblo lands could not be located without survey; what they were, or where they were, was matter of grave doubt without such survey. This follows necessarily from the fact of the grant being one of quantity to be located within four lines, one of which was not designated at all, but was to be an artificial line which should, in conjunction with the three natural ones, be so located as that exactly four square leagues of land should be enclosed. But, above and beyond all this, the natural lines were not easy of location, because of their having been obliterated in many places by artificial changes. In fact, it took years of contest, and no less than three surveys, before these lines were located so as to satisfy the demands of the Land Department.

As exactly four square leagues were to be set off from the extreme upper portion of the peninsula, it follows that the location of the southern line was entirely dependent upon the location of the tide line. By Stratton's survey, the tide line was carried around the marshes, so as to make them a part of the Bay of San Francisco, while by the final survey the tide line was carried between the marshes and the Bay; hence by the former survey the southern line was located

more southerly than it was by the one which finally prevailed; and which was made, we may say in passing, in accordance with the rule which controlled the surveys involved in the cases of *Teschemacher* v. *Thompson* and *Ward* v. *Mulford*, and in the case of *U. S.* v. *Pacheco*, 2 Wallace, 587. Furthermore, the tide line which the surveyor was to find, for a considerable portion of its length had been obliterated, as we have mentioned above, long before the decree of confirmation, and could only be worked out after a most careful examination of all the data that bore upon it. A survey in the field, as to a considerable portion of the line, was impossible, for it must be kept in mind that the tide line to be found was that which existed on the 7th of July, 1846. Now, between that time and the decree in May, 1865, this line had been carried far eastward by repeated fillings of the Bay, not only north of Market, but south of Market as well. Hence, it can be readily seen that here was a case where a natural monument had been so entirely obliterated, and in such peculiar manner, that record evidence of its location became in the last degree imperative; and that to leave the location of such a line to the mercy of witnesses, in every case in which it should be brought in question, and that as against the record, is to practically leave the pueblo lands without any defined boundaries. Of what avail is a confirmed survey, if it is to be treated thus? Why all the elaborate machinery of the Land Department directed to the one end of securing certainty in boundaries, if

these boundaries can be questioned collaterally? They certainly answer no purpose under such circumstances, and might better never be made. And it is certainly just criticism upon our judicial methods, if a controversy, which has been settled, after years of litigation, by a tribunal specially deputed to hear and determine it, can be reopened in another tribunal and treated *de novo*.

In the opinion delivered by Mr. Justice Fox in the State Supreme Court, it is conceded by him that a survey of the Pueblo Lands was necessary by reason of the grant being one of exact quantity, and also by reason of the fact that the southern line was to be a strictly artificial one to be so established as that within all the other lines the exact quantity of land should be included. This artificial line he thinks is safe from collateral attack, while the others live in constant danger, and may in fact be overthrown by the breath of a single witness. It is difficult to treat seriously the distinction here set up; and hence we leave it as it is, merely remarking that, independently of the fact that one boundary can be no more sacred than another, the concession made by the Court not only operates to yield the whole case, for the reason that all the boundaries must be equally safe or equally unsafe, but for the further reason, that this concession carries the implication that the Land Department was acting within its jurisdiction in locating the grant, and that while its judgment may have been erroneous, it was not void, and not being void is safe from all collateral attack.

The State, as is conceded, is subsequent in right to the City, for the City's claim is based on a Mexican grant, while the State acquired no right until her admission into the Union. California is bound by the treaty of Guadalupe Hidalgo, and is also bound, we presume, by the Constitution of the United States, wherein she granted to Congress the power to enact those laws which gave the Land Department exclusive jurisdiction to locate those grants which, on a judicial investigation, were found to be worthy of confirmation. The State can question none of this legislation, nor can her Courts nullify it. By that legislation, the United States set up an elaborate machinery whereby the obligations under the treaty should be made good. This was made up of two parts—judicial and administrative or executive. By the former, there was to be determined all questions arising on the validity of alleged grants, and the quantity and situs of land covered by each grant. By the latter, the land confirmed by the decree was to be definitely located by survey and when so surveyed was to be patented. The former was peculiarly the business of the judicial branch of the government, while the latter appertained quite as peculiarly to the executive. And though the aid of the Courts was sought by way of assisting the Executive Department in the matter of locating grants, first by the Act of 1851, and in a still more marked degree by the Act of 1860, yet the subject is one of administrative, rather than of judicial cognizance, and was so thought by Congress when they

relegated the whole matter to the Land Department by the Act of 1864. The United States having, in fulfilment of its political obligations, provided tribunals to hear and determine all questions which could arise under the treaty, the jurisdiction of such tribunals must necessarily be exclusive. This being so, no State can, through any of its instrumentalities, question the acts of the United States in the matter of confirming or locating Mexican land grants. The State of California agreed, when she entered the Union, that the treaty of Guadalupe Hidalgo should be enforced, and she agreed to all the legislation necessary to carry it into effect. She hence agreed that the City of San Francisco should present her claim to the Board of Land Commissioners; that that Board should act upon it, and that it should be confirmed both by the Board and Court, if they found it valid; that the land covered by the claim, as confirmed, should be by the Land Department of the United States set off by definite boundaries, and when so set off, recorded in Letters Patent. Having thus agreed, can she, by her Courts or by any other of her instrumentalities, question those boundaries? Has she not voluntarily bound herself in the chains of her own forging? That the Land Department had *jurisdiction* to survey and establish those boundaries, there can be no question. When that is conceded, all is conceded. For if that Department had exclusive jurisdiction to *survey* the grant, necessarily it had exclusive jurisdiction to *establish*

the boundaries of the grant, for to survey a tract of land is but to establish its boundaries on the ground.

California can no more question the acts of the United States authorities (when keeping within the lines of their jurisdiction) in regard to the examination and location of Mexican grants, than can the United States themselves. She is no more a "third person" within the meaning of the Act of 1851, than are the United States. This not only follows from what has gone before, but from the fact that the State is but the successor of the United States. This is true even of the tide lands which, with a proudly majestical sound, we proclaim to belong to the State "by virtue of her sovereignty." Nothing could make this clearer than the following statement of it by Mr. Justice SANDERSON in *Ward* v. *Mulford*, 32 Cal., page 372:

"In private proprietorship and in sovereign right the United States succeeded the Mexican Government, and in both these respects California, so far as she acquired any right in either, succeeded the United States and became privy to the latter in estate in respect to all lands within her border, whether such as may be held in private or sovereign right. In this respect no distinction can be made between the lands acquired by her through Federal grants and such as she took by virtue of her sovereignty."

All the tide-flowed lands, all the public lands in California swamp as well as dry, were subject to be charged with a trust in favor of Mexican grantees. These lands stood, therefore, within the bestowal of the United States, in discharge of this trust, in such way as the sovereign might see fit. And as California was privy in estate to this sovereign, she necessarily took the estate burdened with the trust. She came

into the Union *cum onere;* not only to receive favors, but as one of the United States, to assist in discharging obligations. The machinery set up by the General Government by way of discharging the trusts created by the treaty can hence be no more questioned by the State of California than if she herself had constructed it. The only thing she *can* question is that of *jurisdiction*, when the machinery operates in a way to injuriously affect her interests. But, given a Mexican grant; a valid decree determining the tract to be set off to the claimant; a survey made by the proper authorities for the purpose of specifically marking out the boundaries of the tract; and given a confirmation of that survey and a patent in accordance with it, and no question of jurisdiction *can* be raised by the State. For, as we have said above, and here repeat by way of emphasis: If the Executive Department had exclusive jurisdiction to *survey* the grant, necessarily it had exclusive jurisdiction to *establish the boundaries* of the grant, for to survey a tract of land is but to establish its boundaries.

The great question involved in this case rests upon rudimentary principles never disputed. The Governments, State and Federal, are each composed of three separate departments—the executive, the legislative and the judicial. Each within its sphere is entirely independent of the other. When we ascertain that the action of either is within its own established orbit, we then know that such action must be respected and

cannot be reviewed by either of the other departments. The lawful acts of the executive and of the legislative departments must be respected by the judiciary, and the latter can never inquire into the expediency, propriety or accuracy of the executive or legislative departments, excepting only in one respect, and that is, whether such executive or legislative act is within the scope of the respective powers granted to each. When the Court ascertains that a particular matter has by the Constitution been committed to one or both of the other departments of the Government, it has ascertained that the judiciary has nothing to do further with such matter, unless it to be enforce, aid and assist such action.

Now, the power to make treaties with foreign nations is vested by the Constitution of the United States in the President by and with the advice and consent of two-thirds of the U. S. Senate. The same Constitution forbids a State to enter into any treaty. (Art. I, Sec. 10, Con. U. S.) "All treaties made, or which shall be made, under the authority of the United States shall be the Supreme Law of the Land, and the Judges in every State shall be bound thereby, anything in the Constitution or Laws of any State to the contrary notwithstanding." (Art. VI, U. S. Con.) The treaty of Guadalupe Hidalgo is thus made the supreme law of the land, binding upon this and all other courts. By that treaty the United States recognized the principle that, on the change of government from Mexico to the United States, the municipal law remained the same,

and that all private property rights were unchanged; and moreover the United States undertook to maintain all persons in their property as fully as the Mexican government would have protected them.

All treaties are to be executed by the political department of the Government. Mexico had no right to resort to the courts to enforce the treaty, nor could any individual whose rights depended on the treaty seek the courts or ask a specific performance of treaty obligations. The power to carry these out rested with the political department of the Government and with it alone. Congress might by its own acts duly passed have directly confirmed land claims, as was done in some instances in Louisiana, Missouri and Florida. It might select a commission to examine them and make their determination final; it might have referred the matter to the Land Department or Secretary of the Interior, or Commissioner of the General Land Office; or it might vest jurisdiction in the courts to determine the validity of claims. But whatever course might be resorted to, whatever agency provided, it would still be the action of the *political* department of the Government. (See *Grisar* v. *McDowell*, 4 Sawyer, 597; S. C. 6 Wall., 374.)

Congress by the Act of 1851 provided for a Land Commission to whom claims should be presented. The Land Commission has been held by the Supreme Court of the United States not to have been a Court. An appeal to the District Court of the United States and the Supreme Court were also

given. The act of Congress provided that the Commission and the Courts should be governed in their decisions "by the treaty of Guadalupe Hidalgo, the law of nations, the laws, usages, and customs of the government from which the claim is derived, the principles of equity, and the decisions of the Supreme Court of the United States, so far as they are applicable." The same act provided for surveys of the claims when adjudicated, and the ultimate issue of the patent to the claimant when his grant should be confirmed.

Now all this, whether the claim went from the Land Commission to and through the Courts, or stopped at the Land Commission, was merely the action of the political branch of the Government. The Courts were merely used as instrumentalities of the political department. Claims started in the Land Commission and ended in the Land Department with the Secretary of the Interior as its head. Congress so provided, and the fact that intermediate this mode of proceedings the political branch of the Government asked the aid of the Courts to assist it, made such action none the less political; and the grand end and final consummation was the patent issued by the General Land Office; hence all ended in political action and executive duty.

Now, all of these acts, including the survey and patent, were directly within the scope of the powers of the political department and beyond review by any Court, much less a State Court.

Under the Mexican regime there was no distinction, so far as the power to grant was concerned, between the submerged land and upland. That Government could grant each, and especially the great margins of swamp and overflowed land bordering the great bays of San Francisco, San Pablo and Suisun. The jurisdiction of the Land Commission, the United States Courts, the General Land Office—in a word, of the political branch of the Government, extended to submerged or tide-lands just as much as it did to uplands. The State, by virtue of her sovereignty, could not take lands to which claimants under Mexico had such claims as that Government, by its laws, customs and usages recognized as valid, and whether a claim presented was of such a character was to be determined by the agencies, and in the mode provided by Congress.

But it is said that the United States locating officers had no jurisdiction to include any *State* land within the lines of the Pueblo survey. But this was the very question exclusively devolved upon those officers for determination—to lay down a line on one side of which should be State land, and on the other side of which should be City land. As was said by SAWYER, Circuit Judge, in *Manning* v. *San Jacinto Tin Co.*, 7 Sawyer, 127: "The genuineness of the grant and its "*correct location were the very questions in issue and* "*determined in the proceedings for confirmation and* "*segregation under the Acts of Congress, and* "*these questions cannot be re-examined in other tri-*

"*bunals even upon a bill filed by the United States,*" as was held in *U. S.* v. *Flint; U. S.* v. *Throckmorton*, and *U. S.* v. *Carpentier*, 4 Sawyer, 42, affirmed in 98 U. S., 61. And compare with this what is said on page 426 in regard to those cases where the survey could be reached by direct attack. It is simple begging the whole question to say that the locating officers exceeded their jurisdiction by going outside of the decree, for the very subject submitted to their action was a location of the land set out in the decree. To survey a grant is to locate it by definite boundaries, and when the locating officers exercise their functions upon the subject matter of the decree, they are necessarily within the lines of their jurisdiction.

This is not a case of conflicting surveys, or of conflicting decrees; it is a case, simply, where, in the matter of locating a grant protected by the treaty of Guadalupe Hidalgo, the grantee of the State alleges that his land has been taken from him. *But whether or not it was the land of his grantor, the State, was the very question submitted to the Federal tribunals and officers who had been specially deputed to determine it.* He purchased from the State with full knowledge that the grant might be so satisfied as to take this very land. The State could only take what was left after satisfying the grants protected by the treaty, and after satisfaction has been made the mouth of the State is closed. Neither she nor any of her grantees can further litigate what has been fully litigated and determined in the tribunals expressly set

up for the very purpose of such litigation and determination. To follow any other rule is to invite chaos. This is obvious; for the Court have, it is conceded, no power to correct a survey or to order a new one. In the matter of the survey of the pueblo lands of San Francisco, as finally embodied in the patent, if the east line, as now decided by the Court, is held to be erroneous, by what means is another line to be established? The officers of the General Government cannot survey another line, for the matter is now beyond their jurisdiction; the patent having issued, "all the tribunals and officers to whom the special jurisdiction over the matter was committed, have become *functi officio*." The matter is so well stated by SAWYER, Circuit Judge, in *Manning* v. *San Jacinto Tin Co.*, *supra*, that we beg to quote:

"The Government, to carry out the provisions of treaty, committed this whole matter to other and special tribunals, except so far as brought before the ordinary Courts for review on appeal. The Circuit Courts in the exercise of their general and ordinary jurisdiction had nothing to do with it. *If this location is declared void in this proceeding*, and the defendant be decreed to convey to the complainant, *the Court has no power to re-locate the grant, or remand the case to any other Court, board or officer to re-locate it;* and although the *Government* is satisfied with the location, the grantee of a genuine Mexican grant of eleven leagues will lose the land granted. The proceedings for confirmation and location of the grant having resulted in a patent after a fourteen years' litigation, all the tribunals and officers to whom the special jurisdiction over the matter was committed, have become *functi officio*."

In the opinion first delivered in the case at bar by Mr. Justice PATTERSON (85 Cal., 474–483), on the decision rendered in Department, and which opinion is approved by the majority of the Court, it is claimed

that a distinction can properly be drawn as to the conclusiveness of the location of a Mexican grant, between a grant covering a tract having specific boundaries, and one covering a specific quantity lying in an area of larger extent.

The distinction thus sought to be drawn between a sobrante or float and a grant having specific boundaries, is obviously not sound, for it is quite manifest that the surveyor, in surveying a sobrante, might in the opinion of some court or jury, carry his line beyond one of the exterior boundaries, and if he did so, the question involved would be the same as if the survey had been of a grant having specific boundaries. The distinction set up assumes that the surveyor would always keep within the exterior boundaries; and on this assumption, we are told that his acts and those of the Land Department in approval thereof, would be safe from collateral attack, while in the case of locating a grant having specific boundaries, no such rule would apply. But the assumption is really based upon the presumption that the locating officers will keep within the decreed lines; and this presumption applies to one class of grants the same as to another.

It is said in Mr. Justice PATTERSON'S opinion that in the Teschemacher case the grant was assumed to be a sobrante. The words of Chief Justice FIELD are as follows: "We are not informed by the record "whether it was of a specific tract with definite bound- "aries, or was only of a specific quantity lying in one "area of larger extent. *We shall assume for the pur-*

"*poses of the present appeal that it was of the latter* "*character*, and conveyed only an interest, requiring "further action of the Government, and that such ac- "tion was not had previous to the cession." Manifestly, the Chief Justice thought that by assuming the grant to have been a sobrante, he was putting the case in the strongest possible attitude for the party claiming under the State—as indeed he was.

What the Federal Courts have Decided.

What we have said heretofore has been said from the reason of the thing, and would seem to need no authority to support it. But the authority is so ample as to embarrass one with its riches. We have endeavored to show that no jurisdiction exists in the State Courts to review the decisions of the Land Department in the matter of surveying Mexican grants; but even the Federal Courts decline to take jurisdiction in cases which involve a collateral attack upon such decisions.

In the case of *Ballance* v. *Forsyth*, 13 How., 18, the facts were, that on the 15th of May, 1820, Congress passed an Act for the benefit of the inhabitants of Peoria, by which every person claiming a lot in the village was to give notice to the Register of the Land Office whose report was to be laid before Congress; that on the 3rd of March, 1823, Congress passed another Act granting to each of the French and Canadian inhabitants and other settlers the lot on which they had settled, and directed the surveyor of

public lands to make a plot of the lands for which patents were to be issued to the claimants; that this survey and plot were not made until April and May, 1837; that in November, 1837, a person who was not a settler purchased at the Land Office at private entry a fractional quarter of land which included some of the above lots, and soon afterwards obtained a patent; and that the certificate and patent reserved the rights of the claimants under the Acts of Congress above mentioned. It was not until 1845 and 1847 that these claimants obtained their patent. It was thereupon held that they were entitled to recover in ejectment against the persons who held under the private entry. It appears (24 How., 184) that after the mandate went down from the Supreme Court to the Court below, Ballance (the party claiming by private entry) filed a bill on the equity side of the Court, setting forth the same title which had been involved in the suit at law, and praying relief upon certain special grounds, which the Court Reporter says are not necessary to enumerate. Whereupon Mr. Justice CAMPBELL delivered the opinion of the Court, in which he uses the following language:

The plaintiff "further objects to the title of his adversaries. He insists that in the *location of their claim, under the Acts of May*, 1820, *and March*, 1823, referred to in the report of the case as the source of their title, there was an *erroneous location and survey and that a larger extent of ground was conceded to them than they were entitled to; that the plan of survey did*

not conform to the requirements of Congress, and that their proofs were not filed in time. * * * *It is the settled doctrine of this Court that in the location and survey of claims arising under Acts of Congress like those of May*, 1820, *and March*, 1823, *the Executive Department of the Government has, in general*, EXCLUSIVE JURISDICTION, and that all questions arising upon their location and survey are administrative in their nature, and must be disposed of in the Land Office." Says the Justice further: "The plaintiff was aware of the existence of these claims, and of the jurisdiction to which they were confided"—language entirely appropriate to the State in this controversy—and says further, that if he pretermitted his opposition to the survey before the General Land Office, he was bound by his laches, and that if he was unsuccessful in his opposition, the decision of that Department upon his objections was binding upon him. So that plaintiff's effort to disturb the survey failed in equity as it had in law.

West v. *Cochran*, 17 How., 403, was a case where West claimed under a reservation made by Brazeau in a deed to one Labeaume, and under the confirmation of Brazeau's title by the Board of Commissioners on the 22nd of September, 1810. Cochran claimed under a similar confirmation of the same date to Labeaume. The patent for Brazeau's claim did not include the land in dispute, while the patent for Labeaume's claim did include it; and the question was, whether West, claiming under Brazeau's title, could show that the land had been erroneously located, and could claim under the

confirmation. The Court below decided against West, and the Supreme Court affirmed the judgment.

The question of law in the case was raised upon the following instruction given to the jury:

"Recently, the surveys of these tracts were made according to the precise instruction as to their boundaries coming from the General Land Office at Washington, and pursuant to the order of the Secretary of the Interior; and on these surveys patents have issued, one to the legal representatives of Labeaume, and the other to the legal representatives of Brazeau, which tracts adjoin each other on the southern boundary of Labeaume's tract, as described in the patent; and one question is *whether the plaintiff to this suit can claim land elsewhere than that described in his patent;* in other words, whether he can abandon the land surveyed for him and granted by patent, and go further north and receive land there which never had been surveyed in conformity to the concession.

"*We are of the opinion that the United States reserved the power to locate, by survey, the land confirmed to Brazeau, and by such survey to separate it from the public lands, and from the lands claimed by others,* and to issue a patent therefor as was done in this instance; that this reserved power was vested in the Executive Department, whose acts in this instance bound Brazeau and those claiming under him; nor can they extend their claim and recover land beyond the boundaries described in the patent to Brazeau or his legal representatives."

The Court, in dealing with this question, proceed to consider the condition of claims to land derived from France and Spain before the United States acquired Louisiana, which condition was very much the same as that which pertained to claims to lands derived under Mexican grants. In each class of cases, those claiming lands had but equitable rights, and had to depend upon the bounty of the new Government to see that those equitable rights were protected by proper proceedings. In each class of cases, it being necessary, in nearly all instances, that surveys should

be made, in order to properly locate the land claimed, the decisions of the Supreme Court of the United States, which deal with claims to land derived from France and Spain, must be considered to be directly in point in dealing with cases such as is the case at bar. We therefore call particular attention to the following language of Mr. Justice CATRON, speaking for the Court in *West* v. *Cochran*, at pages 414 and 415:

"It has often been held by this Court that the judicial tribunals, in the ordinary administration of justice, had no jurisdiction or power to deal with these incipient claims, *either as to fixing boundaries by survey*, or for any other purpose, but that claimants were compelled to rely upon Congress, on which power was conferred by the Constitution to dispose of, and make all needful rules and regulations respecting the territory and property of the United States. Among these needful regulations *was that of providing that these unlocated claims should be surveyed by lawful authority*—a consideration that has occupied a prominent place in the legislation of Congress from an early day. * * * * It was competent for Congress to take up these titles or rights, and act on them either by legislating directly that each claim should be confirmed, and have a perfect title to his actual possession lawfully acquired under France or Spain, without ascertaining in the act of confirmation, or by any special means provided therein, the bounds of claims confirmed. But it was also competent for Congress to provide that, before a title should be given to any possessor, the exact limits of his possession, and the title which the United States was to give, should be defined, and that this should be done by such agencies and in such manner as might be fixed by Congress. * * * * * Congress having said, by the Act of 1807, that he shall be confirmed in what shall be designated by a survey made under the authority of the United States, according to the direction of the Board of Commissioners, and such direction to survey being a condition which the judgment of confirmation carried along with it, until the survey was made, the plaintiff's title attached to no land, nor could a court of justice ascertain its boundaries *as this power was reserved to the federal department of the executive government.* It follows that the legal representative of

Brazeau, who brings suit, had no title at the time it was brought that would support an action of ejectment."

The judgment of the Circuit Court was therefore affirmed. We have here the most specific decision, not only by the Circuit Court of the United States sitting for the District of Missouri, as embodied in the instruction above given, but of the Supreme Court of the United States as well, that in the matter of locating grants conditioned as is the grant involved in the case at bar, the power rests exclusively with the United States Government as to the manner of its execution, and that the Courts of all degrees are powerless to interfere in the matter, whether by way of ordering new surveys, or by way of changing the boundaries which have been made under the authority of that Government.

The same Justice, delivering the opinion of the Court in *West* v. *Cochran*, also says in *Stanford* v. *Taylor*, reported in 18 How., 412:

"But where the claim has no certain limits, and the judgment of confirmation carries along with it the condition that the land shall be surveyed and severed from the public domain and the land of others, then it is not open to controversy that the title attaches to no land; NOR HAS A COURT OF JUSTICE ANY AUTHORITY IN LAW TO ASCERTAIN AND ESTABLISH ITS BOUNDARIES, THIS BEING RESERVED TO THE EXECUTIVE DEPARTMENT. The case of *West* v. *Cochran*, 17 How., 403, needs only to be referred to as settling this point."

The title of Brazeau, which was in issue in the case of *West* v. *Cochran, supra*, is dealt with again in the case of *Magwire* v. *Tyler*, 1 Black, 198. Those claiming under Brazeau, having failed as above mentioned in their action of ejectment, filed their bill in

the State Circuit Court, on the equity side of that Court, on the assumption that the Court had only decided in the former case that Brazeau's incipient but equitable title would not sustain an action of ejectment; but they failed in the latter action as they did in the former one. It seems, in the suit in equity, a survey was relied on which had been approved by the Commissioner of the General Land Office, but which was subsequently rejected by the Secretary of the Interior (a state of facts exactly the same as that which took place in the matter of the survey of the Pueblo Lands of San Francisco), and one of the questions in the case was, whether the Secretary of the Interior had power to review the action of the Commissioner of the General Land Office, the Court holding that he had such power. (See also the case of *Snyder* v. *Sickles*, 98 U. S., pages 203–211.)

In the case of *Willot* v. *Sanford*, 19 How., 80, the defendant's rights under the patent were assailed upon the ground that more land was embraced therein than was embraced in the confirmation; and the jury was instructed by the Circuit Court that the survey and patent were not conclusive evidence that the land they embraced was correctly located and surveyed according to the confirmation, and that if they believed that the land sued for was not *within the confirmation* to the legal representatives of the patentee, althought it might be *within the survey and patent*, then the survey and patent could not protect the defendants.

In accordance with the instruction *the jury found that*

the final survey did not correspond to the confirmation; that it was illegally extended so as to interfere with the claim upon which the plaintiff relied; BUT THE SUPREME COURT REVERSED THE COURT BELOW AND RE-AFFIRMED THE DOCTRINE LAID DOWN IN WEST V. COCHRAN, *supra*, the Justice speaking for the Court saying at page 82: "In the next place the United "States reserved the power to survey and grant "claims to lands in the situation that these contend-"ing claims were then confirmed; nor have the Courts "of Justice any authority to disregard surveys and "patents, when dealing with them in actions of "ejectment."

Beard v. *Federy*, 3 Wallace, 478, was a case where the plaintiff deraigned his title from Alemany, the Catholic Bishop of Monterey, to whom a patent embracing the premises in controversy was issued by the United States. The defendants relied upon a grant that had never been presented to the Board of Land Commissioners for confirmation, and which had never been confirmed, but which they claimed was a good title, in that it was not a grant in colonization, but a sale made according to the recital on its face, by order of the Departmental Assembly; a sale, too, to save the nation in a crisis of supreme need, and that it vested a good title in the parties under whom the defendants claimed anteriorly to the church's title, and could not be divested by any title subsequent to the conquest. Defendants further insisted that the petition of the Bishop presented to the Board of Land

Commissioners did not show that he claimed by virtue of any right or title derived from the Spanish or Mexican Government, which could give him the benefit of the Act of 1851, passed for the purpose of settling and determining private land claims in California.

The law thence arising, and the force and effect of a patent issued on a confirmed grant is so well stated by Mr. Justice FIELD, speaking for the Court, that we quote at length:

"The position of the defendants is, that as against them the patent is not evidence for any purpose; that as between them and the plaintiff the whole subject of title is open precisely as though no proceedings for the confirmation had been had, and no patent for the land had been issued. Their position *rests upon a misapprehension of the character and effect of the patent issued upon the confirmation of a claim to land under the laws of Spain and Mexico.* In the first place, the patent is a deed of the United States. As a deed its operation is that of a quitclaim, or rather of a conveyance of such interest as the United States possessed in the land, and it takes effect by relation at the time when proceedings were instituted by the filing of the petition before the Board of Land Commissioners. In the second place, *the patent is a record of the action of the Government upon the title of the claimant as it existed upon the acquisition of the country.* Such acquisition did not affect the rights of the inhabitants to their property. They retained all such rights, and were entitled by the law of nations to protection in them to the same extent as under the former government. The treaty of cession also stipulated for such protection. The obligation to which the United States thus succeeded was, of course, *political in its character, and to be discharged in such manner, and on such terms, as they might judge expedient.* By the Act of March 3, 1851, they have declared the manner and the terms upon which they will discharge this obligation. They have there established a special tribunal, before which all claims to land are to be investigated; required evidence to be presented respecting the claims; appointed law officers to appear and contest them on behalf of the Government; authorized appeals from the decisions of the tribunal—first to the District and then to the Supreme Court; *and designated officers to survey and measure off the land when the validity of the claim is finally determined.* When informed by the action of its

tribunal and officers, that a claim asserted is valid and entitled to recognition the Government acts and issues its patent to the claimant. This instrument is, therefore, record evidence of the action of the Government upon the title of the claimant. By it the Government declares that the claim asserted was valid under the laws of Mexico; that it was entitled to recognition and protection by the stipulations of the treaty, and might have been located under the former Government, and is *correctly located now so as to embrace the premises as they are surveyed and described.* As against the Government, so long as it remains unvacated, it is conclusive. AND IT IS EQUALLY CONCLUSIVE AGAINST PARTIES CLAIMING UNDER THE GOVERNMENT BY TITLE SUBSEQUENT. It is in this effect of the patent as a record of the Government that its security and protection chiefly lie. If parties asserting interest in lands acquired since the acquisition of the country could deny and controvert this record, and compel the patentee in every suit for his land to establish the validity of his claim, his right to its confirmation, and *the correctness of the action of the tribunals and officers of the United States in the location of the same*, the patent would fail to be as it was intended it should be—an instrument of quiet and security to its possessors. The patentee would find his title recognized in one suit and rejected in another, and if his title were maintained, *he would find his land located in as many different places as the varying prejudices, interests or notions of justice of witnesses and jurymen might suggest.* Every fact upon which the decree and patent rest would be open to contestation. The intruder, resting solely upon his possession, might insist that the original claim was invalid, *or was not properly located*, and, therefore, he could not be disturbed by the patentee. No construction which will lead to such results can be given to the fifteenth section [meaning fifteenth section of the Act of 1851, for the purpose of settling and determining private land claims in California]. The *term "third person," as there used, does not embrace all persons other than the United States and the claimants, but only those who hold superior titles, such as will enable them to resist successfully any action of the Government in disposing of the property.*

The State is no such "*third person*," as we have shown, and as appears from numerous authorities cited in this brief. Nothing could be added to the force and conclusiveness of what is stated by the learned Justice. Not only is the law of the subject set out with

the greatest degree of lucidity, but the dangers and mischiefs which would arise from permitting what is attempted in the case at bar, are also most strikingly pointed out. There can be no security if boundary lines which have been established by those authorized to establish them, and boundary lines, too, which have in many instances cost great study and much labor carefully to establish, can be questioned by parol. There must, in the nature of things, be a final stage in all legal proceedings beyond which litigation can no further go. There can be no such final stage if the boundaries of confirmed Mexican grants in this State can be questioned by parol. No one can tell what litigation may arise when these boundaries might be called in question; and those who derive their title under such grants could never feel secure that the land as finally surveyed and patented was the land they were really entitled to. Nor can it make any difference in principle whether the tract has specific boundaries or not. If the party has presented his claim, and the United States authorities deem that the claim is one that should be surveyed, their judgment must be controlling in that respect. And when these authorities have made that survey the survey must on reason and authority be held to be conclusive; but in the case of the Pueblo Lands of San Francisco, as has been shown above, the boundaries were not specific. It was a grant for quantity, and it was absolutely necessary to segregate the precise quantity from the lands not only of the United States, but of the lands of the State.

As has been shown, it was a matter of some difficulty to tell where the line of ordinary high water, as the same existed on the 7th of July, 1846, was. And even if it had been a matter of no difficulty; even if that line had been fully determined; still it was absolutely necessary to survey the grant in order that the precise quantity of four square leagues might be set off to the City. That the State of California is in no position to question this has been shown, and will be more fully shown before we get through. Her rights are all subsequent to those of the City. Her rights, whatever they might be, depend entirely upon what the United States Government might do with relation thereto. She could not question what the General Government would do in regard to that matter. When she came into the Union, as has been said above, she authorized the General Government to proceed to adjust in its own way all the equitable claims arising under Mexican grants, one of which was the Pueblo Grant. And can she now, after having so agreed, and after that adjustment has been made, question it in any way? On no principle of law or justice can she do so. The same learned Justice who delivered the opinion of the Court in *Beard* v. *Federy*, again says in *Smelting Company* v. *Kemp*, 104 U. S., 641:

"It is this unassailable character which gives to it [the Patent] its chief, indeed its only value, as a means of quieting its possessor in the enjoyment of the lands it embraces. If intruders upon them could compel him, in every suit for possession, to establish the validity of the action of the Land Department and the correctness of its ruling upon matters submitted to it, the patent, instead of being a means of peace and security, would subject his rights to constant and ruinous litigation.

He would recover one portion of his land if the jury were satisfied that the evidence produced justified the action of that Department, and lose another portion, the title whereto rests upon the same facts, because another jury came to a different conclusion. So his rights in different suits, upon the same patent, would be determined, not by its efficacy as a conveyance of the Government, but according to the fluctuating prejudices of different jurymen, or their varying capacities to weigh evidence."

To the same effect is *Steel* v. *Smelting Company*, 106 U. S., 447.

Johnson v. *Towsley*, 13 Wallace, 72.

French v. *Fyan*, 93 U. S., 169.

Hayner v. *Stanley*, 8 Sawyer, 214.

Boyle v *Hinds*, 2 *Id.*, 527.

Manning v. *San Jacinto Tin Co.*, 7 *Id.*, 424.

Maguire v. *Tyler*, 8 Wall., 651.

Snyder v. *Sickles*, 98 U. S., 212.

In the very recent case of the *City and County of San Francisco* v. *Eugene LeRoy*, decided by this Court at the last October Term, it became necessary to examine the force and effect of a State deed similar to that under which Defendant in Error claims, when pitted against a title derived under the Pueblo of San Francisco. In fact, the very question now before the Court was before the Court last October, and was ruled adversely to Defendant in Error. In that case it became necessary to examine into the validity of the State deed for the very particular reason, that if that deed were valid, it was clearly unnecessary to provide in the decree for a reservation of streets and squares on behalf of the City; but if, on the other hand, the land were *Pueblo* land, then the City, as the Court

held, was entitled to such reservation. The question, hence, was one involved and one to be decided, and in dealing with it, the Court, speaking through Mr. Justice FIELD, use the following language:

"We do not attach any importance, upon this question of reservation, to the deed of the Tide-land Commissioners, executed to Sullivan on the 30th of October, 1876, for the State did not at that time own any tide or marsh lands within the limits of the pueblo as finally *established by the Land Department*. All the marsh lands, so-called, which the State of California ever owned, were granted to her by the act of Congress of September 28, 1850, known as the Swamp land Act, by which the swamp and overflowed lands within the limits of certain States, thereby rendered unfit for cultivation, were granted to the States to enable them to construct the necessary levees and drains to reclaim them. (9 Stat., chap. 84, p. 519.) The interest of the pueblo in the lands within its limits goes back to the acquisition of the country, and precedes the passage of that act of Congress. And that act was never intended to apply to lands held by the United States charged with any equitable claims of others, which they were bound by treaty to protect. As to tide-lands, although it may be stated as a general principle—and it was so held in *Weber* v. *Board of Harbor Commissioners*, (18 Wall., 57, 65)—that the titles acquired by the United States to lands in California under tide-waters, from Mexico, were held in trust for the future State, so that their ownership and right of disposition passed to it upon its admission into the Union, that doctrine cannot apply to such lands as had been previously granted to other parties by the former government, or subjected to trusts which would require their disposition in some other way. When the United States acquired California it was with the duty to protect all the rights and interests which were held by the pueblo of San Francisco under Mexico. The property rights of pueblos equally with those of individuals were entitled to protection, and provision was made by Congress in its legislation for their investigation and confirmation. (*Townsend* v. *Greeley*, 5 Wall., 326, 337.) The duty of the Government and its power in the execution of its treaty obligations to protect the claims of all persons, natural and artificial, and of course of the City of San Francisco as successor to the pueblo, were superior to any subsequently acquired rights or claims of the State of California, or of individuals. The confirmation of the claim of the City necessarily took effect upon its title as it existed upon the acquisition of the

country. In confirming it, the United States through its tribunals recognized the validity of the claim to the title as then existing, and in execution of its treaty obligations no one could step in between the Government of the United States and the City seeking their enforcement. It is a matter of doubt whether there were any lands within the limits of the pueblo, as defined and established by the Land Department, that could be considered tide-lands, which, independently of the pueblo, would vest in the State. The lands which passed to the State upon her admission to the Union were not those which were affected occasionally by the tide, but only those over which tide-water flowed so continuously as to prevent their use and occupation. To render lands tide-lands, which the State by virtue of her sovereignty could claim, there must have been such continuity of the flow of tide-water over them, or such regularity of the flow within every twenty-four hours, as to render them unfit for cultivation, the growth of grasses, or other uses to which upland is applied. But even if there were such lands, their existence could in no way affect the rights of the pueblo. Its rights were dependent upon Mexican laws, and when Mexico established those laws she was the owner of tide lands as well as up-lands, and could have placed the boundaries of her pueblos wherever she though proper. It was for the United States to ascertain those boundaries when fixing the limits of the claim of the City, and that was done after the most thorough and exhaustive examination ever given to the consideration of the boundaries of a claim of a pueblo under the Mexican Government. After hearing all the testimony which could be adduced, and repeated arguments of counsel, elaborate reports were made on the subject by three Secretaries of the Interior. They held, and the patent follows their decision, that the boundary of the bay, which decree of confirmation had fixed as that of ordinary high-water mark, as it existed on the 7th of July, 1846, crosses the mouth of all creeks entering the bay. There was, therefore, nothing in the deed of the Tide-land Commissioners which could by any possibility impair the right of the City to exercise the power reserved in the Van Ness ordinance over such portions of the lands conveyed to occupants under that ordinance as had been occupied or set apart for streets, squares, and public buildings of the City. Such a reservation should have been embodied in the decree in this case. The decree should therefore be modified by adding the declaration that nothing therein shall be deemed to impair in any respect the rights reserved in the Van Ness ordinance to the City of San Francisco, or to its successor, the City and County of San Francisco, over lands that had

then been occupied or set apart for streets, squares, and public buildings of the City, and as thus modified be affirmed; and it is so ordered."

The decision of the Supreme Court of the State seems to be mainly based upon the notion that *Smelting Co.* v. *Kemp*, 104 U. S., 614; *Wright* v. *Roseberry*, 121 U. S., 519; and *Doolan* v. *Carr*, 125 U. S., 618, give the right to the State Courts to question the location of a Mexican grant, as that location stands evidenced by a patent; and in fact, it seems to have been considered by the Justices joining in the prevailing opinion, that those cases have enlarged the operation of the rule as to collateral attack on patent. Never was there greater judicial misconception. No such question was involved in either of the cases as is involved here; this being well shown by the dissenting Justices in their opinion. (Fol. 48, Transcript of Record.) Nor do those cases lay down any different rule as to collateral attack on patent from that which was enunciated years ago. It is doubtful if any great contribution has been made to the law of collateral attack on patent since *Patterson* v. *Winn*, 11 Wheat., 381; and since the leading case of *Doll* v. *Meador*, 16 Cal., 325, wherein Mr. Justice FIELD, as Chief Justice of the California Supreme Court, in delivering the opinion, lays down the rule with its limitations so clearly and so precisely, as that nothing is left to doubt or conjecture, and as that in any particular case it ought not to be matter of great difficulty to determine whether it be within or without the operation of the rule. As we read the federal decisions from *Patterson* v. *Winn* down

to the present time, there is no variation from the doctrine that if the granting officer have no power under any circumstances to make the grant, the grant can be attacked in any action in which it is sought to prove a title or lien, or a right under it. *Smelting Co.* v. *Kemp*, and the other cases in line with it, say this, just as *Patterson* v. *Winn* said it; but the former has gone no further than the latter, nor has the rule been so expanded as to embrace any cases which were not embraced by the earlier authorities. True it is, that the rule has been brought to bear upon a great variety of facts; true it is, that it has been greatly elaborated; but the rule itself has remained in all its essentials substantially the same. Now, independently of those political considerations which govern the location of Mexican grants under the treaty of Guadalupe Hidalgo, let us look at the case at bar in the light of *Smelting Co.* v. *Kemp*, etc. Those cases are to the point that the Patent is void if the officer be without jurisdiction over the subject matter. *If then, the locating officers in the matter of the Pueblo Lands of San Francisco, had jurisdiction to survey, locate and patent* the lands described in the decree, there is an end of the cases cited, as controlling authority here. That they had such jurisdiction is beyond all question, for it is not claimed that they dealt, or sought to deal, with any land except four leagues of that which is situate on the extreme upper portion of the Peninsula of San Francisco, and being bounded by the ocean, the bay and an artificial southern line so run as to include ex-

actly four square leagues. Having jurisdiction to deal with the piece of land thus situated, and having dealt with it as the law provided, the acts of the locating officers may have been erroneous, but under no circumstances could they be void.

The question is one simply of power, and whether the acts of the locating officers be made under the original Act of 1851, or under the amendments to it of 1860, 1864 and 1866, the quality of the acts is the same, the power exercised is devoted to the same political purpose, and must be measured by the same legal standard. By the Act of 1860, the United States District Court determined the location; by the Act of 1864, the General Land Department; but the adjudication of the former did not have a feather's weight additional value over that of the latter. Both were set up by Congress as special machinery whereby the obligations incurred under the Treaty of Guadalupe Hidalgo, and under the law of nations as well, might be made good. The distinction, hence, which is sought to be set up between the locating acts done under the Statute of 1860 and those done under the Act of 1864, is wholly without basis.

What the Supreme Court of California has Decided.

The Supreme Court of this State is entirely at one with the Supreme Court of the United States on this subject. In *Moore* v. *Wilkinson*, 13 Cal., 484, plaintiffs derived their title under a Mexican grant which

described the land as lying in the immediate vicinity of the River Sacramento, and as bounded on the north by the base of the snowy mountains, on the south by the lands of John E. Sutter, and the east by the Feather River. No boundary on the west was specified, but to the *expediente* a map of the tract was annexed, and to that map reference was made in the grant, the third condition of which was in the following language: "The land of which donation is made is "merely four square leagues (or four ranges of neat "cattle) in conformity with the map annexed to the "proceedings. The judge who may give them pos- "session will cause the same to be measured accord- "ingly to the ordinance, leaving the remainder which "may result to the nation for its proper uses." In April, 1857, four leagues, the specific quantity granted, were laid of and surveyed under the direction of the Surveyor General of the United States for California, and the survey was in May following approved by that officer. Upon his survey, and in pursuance of the confirmation, a patent of the United States was issued to the claimants, bearing date the 14th October, 1857, for four leagues of land with the specific description of the official survey. The patent included the premises in controversy; and to resist its effect the defendants offered *parole evidence to show that the four leagues as surveyed and patented were different from the tract designated in the grant and the map to which the grant makes reference; that a correct survey of the tract as granted would not include the premises in suit;* that

the defendants were citizens of the United States and pre-emption claimants, insisting that as such claimants they had acquired vested rights, and that the confirmation of the grant and the patent issued thereunder were not conclusive against them under the provisions of the fifteenth section of the Act of Congress of March 3, 1851. The Court below excluded the evidence offered, and its ruling in this respect constituted the principal error assigned for the reversal of the judgment. The Supreme Court held that the ruling of the Court was correct, and that the position of the defendants was untenable. The Justice, delivering the opinion of the Court, after stating that there was no certainty and precision in the boundaries of the grant, and that a survey was necessary in order to locate it, proceeds to say, that the *right of so locating it belonged to the political department of the Government, and could not be exercised by Courts of Justice;* that the Courts could ascertain and fix the position of boundaries which were designated, but could not give boundaries to a specific quantity which has none and lies in a larger tract; that to give precision and location to such specific quantity a survey must be made by the proper department of government in which the subject is vested by the legislation of Congress; and that with the action of that department *the judiciary could not interfere;* that the "judiciary must determine, it is "true, whether prior rights of third parties have been "interfered with by the survey and patent issued "thereon, but it cannot correct the one or the other

" and *locate the land where, in its judgment, the loca-*
" *tion ought originally to have been made.* The sur-
" vey and patent are conclusive upon it in actions of
" ejectment, *except when in conflict with the prior*
" *rights of third persons*, and then their inconclusive-
" ness can be asserted only to the extent essential for
" the protection of such prior rights."

Again, at page 487, the Chief Justice says:

" The title of the grantees to the land contained within the map may be admitted to have been perfect, and yet no conclusion follows against the claim of the plaintiffs. If they have accepted the land described in their patent, as satisfying their claim, no other persons can object that a portion of the land thus taken is without the boundaries of the grant, unless their prior rights are interfered with. This is a matter between the Government and the grantees, with which strangers have no concern. The answer, however, to the position of counsel is this: The Government had provided a board for the determination of the validity of claims to lands held under Mexican grants, and a system for the survey and location of the lands upon the recognition and confirmation of such claim. The survey and location are to follow the decree of confirmation. The approval of the survey by the proper officers is the determination—the judgment, of the appropriate department of Government, that the survey does conform to such decree. That determination or judgment is not then a subject of review by the judiciary. It is conclusive upon the Courts in actions of ejectment, as the adjudication of a competent tribunal upon a subject within its exclusive jurisdiction. The patent, which is the final document issued by the Government, is conclusive evidence of the validity of the original grant and of its recognition and confirmation, and of the survey, and its conformity with the confirmation, and of the relinquishment to the patentee of all the interests of the United States in the land. It cannot be attacked collaterally even for fraud, whether charged to have existed in the procurement of the original grant, or in the proof of its execution, or in the making of the survey. For these matters the right of interference *rests only with the Government.*"

So also in *Yount* v. *Howell*, 14 Cal., 465, wherein a pre-emptor sought to collaterally attack a patent upon

the ground that the tract of land described in the grant and the petition to the Commissioners *was different from that embraced in the patent, it was held that evidence offered for the purpose of showing such a state of facts was properly excluded.*

The Chief Justice, speaking for the Court, at page 469, says that the pre-emptor "possessed no interest "giving him a standing in Court against the assertion "of the rights of the plaintiff. The pre-emption laws "of the United States were not extended to Califor- "nia until after the proceedings had been taken for "the confirmation of the claim under the grant, and to "the first step in such proceedings the patent took "effect by relation. But aside from this consideration, "the evidence was inadmissible. The action of the "officers of Government in the location of lands "claimed under confirmed Mexican grants *cannot be "inquired into in an action for ejectment.* The pat- "ent is conclusive upon these matters in such action. "Its existence implies a compliance with every pre- "requisite of the law to its issuance. Unless a patent "is issued without authority, or is prohibited by stat- "ute, or is void upon its face, *its operation against "the Government and those* CLAIMING BY TITLE SUBSE- "QUENT, *cannot be questioned in any collateral suit.* "For errors, irregularities or fraud committed in any "of the steps preliminary to its issuance, inquisition "can only be had in a proceeding taken directly for "that purpose."

Leese v. *Clark* is quite a noted case, which was

twice in the Supreme Court, and can be found reported in 18 Cal., 535, and 20 Cal., 387. In that case the plaintiff relied upon a Mexican grant and the patent issued thereon for certain lots in San Francisco, the defendants relying upon grants of the same premises in lots of fifty varas each, made to them in 1847 by persons acting as alcaldes or chief magistrates of the Pueblo of San Francisco, defendants contending that the Board of Land Commissioners had no jurisdiction to pass upon the claim of the plaintiff, and that as a consequence the action of the United States authorities in issuing the patent was without authority and void; or that, if those authorities had such jurisdiction, the defendants claiming under the deeds were "third persons" within the meaning of the fifteenth section of the Act of Congress, against whom the decree of confirmation and patent were not conlusive, and that they were in consequence at liberty to *question the location* of plaintiff's grant. But the Supreme Court on both appeals ruled against the claim of the defendants, and asserted with great vigor the principle for which we are here contending. In this litigation the genuineness of the grant under which the plaintiffs claimed was not questioned, the principal question at issue being as to whether the *grant was properly located*, the defendants claiming that as "third persons" within the meaning of the Act of Congress of March 3d, 1851, they could *question the location of the premises* the same as if the grant had never been before the Land Commission. Proceeding upon this view, defendants

directed their proof to show that the premises in controversy *were not embraced in the grant in question.* (18 Cal., p. 566.) The jury found for defendant on the grounds as stated in their verdict that they could not locate the grant as claimed by the plaintiff. *The Supreme Court in that case held that notwithstanding the defendants claimed the grant from the pueblo, they were not in a position to question in any way whatever the location of the prior grant which had been made by the Mexican authorities to the plaintiffs.*

Says Mr. Chief Justice FIELD, speaking for the Court, at page 574 of 18 Cal.:

"The defendants, as junior grantees, took their grants with this knowledge: That if the military occupation of the country ceased, and the displaced Mexican authorities were restored, they would only take, if in that event they were allowed to take at all, in subordination to the action of those authorities in the location of the elder grant; and that if the United States retained permanent possession of the country they would take in subordination to like action of the new government. By the action of March 3d, 1851, the new government designated the manner and conditions under which the right and power of location would be exercised, and declared the effect which should be given to proceedings had. *The defendants taking whatever interest they may possess* in SUBORDINATION TO THE FUTURE ACTION OF THE GOVERNMENT, *old or new, in determining the location of the elder grant, are in no position to question those proceedings.* As the Government acted in those matters only through its appointed tribunals and officers, if it shall discover that imposition and fraud have been practiced upon them, and have produced a result which otherwise would not have been obtained, *it may institute proceedings to vacate the confirmation and patent, and annul or correct the location.* But unless the Government interferes in the matter, the defendants, as JUNIOR GRANTEES, are remediless. The title to the premises was not such at the date of the treaty as to enable them to resist the action of the Government in the location of the elder grant. They are not, therefore, "third persons," within the meaning of the fifteenth section of the Act of Congress."

The action of the Court below having been adverse

to these views, and judgment having gone for the defendants, that judgment was reversed, and the case sent back for a new trial.

Again, when the case was tried anew, the Court failed to carry out the views as expressed by the Supreme Court, on the appeal from the former judgment, and hence a second appeal, a report of which is to be found in 20 Cal., 387. On this second appeal, the Court with more vigor than before asserted the rules which should govern such cases, and reversed the judgment of the Court below, with the direction to enter judgment for the plaintiff upon the special findings pursuant to the prayer of the complaint.

We call particular attention to the language of the Chief Justice delivering the opinion of the Court, as given from pp. 420–426, it being too long to here give in full.

In *Miller* v. *Dale*, 44 Cal., 562, the leading cases on the subject of who are "third persons" within the meaning of the fifteenth section of the Act of 1851 are examined, and these authorities are all to the point that parties standing in the position of the State of California are no such persons.

Chipley v. *Farris*, 45 Cal., 528, is a case where it is specifically decided *that if the decree of confirmation covers land not included in the survey, and not conveyed by the patent, the claimant has no title to the surplus which is not conveyed by the patent; and that the boundaries mentioned in the proof of survey must prevail over those mentioned in the decree of confirmation.*

And to the question, "Can the decree be read in con-
"nection with the patent? and which shall control,
"the boundaries given in the decree, or those given in
"the patent?" the Court replied that the decree could not be so read, and that *the claimant's title was confined to the land as described in the approved survey*, EVEN IF THE DECREE OF CONFIRMATION WERE INSERTED IN THE PATENT.

The case was one where the plaintiff relied on the decree as against the patent; and the Court took precisely the reverse view to that held by the Court in the case at bar. Plaintiff was grantee of the patentee, and brought ejectment against the party claiming under the patent, he insisting that the patent unduly restricted the boundaries of the grant as they were set out in the decree, and that he was entitled to recover the land confirmed by the decree less that described in the patent. In other words, he claimed that the decree should control the patent as to the location of the land and that the Court should look into the decree to ascertain whether or not such was the fact.

That this was a case where, beyond any cavil or doubt, there was *a variance between the decree and the survey*, is plain enough from the statement of it; but it is placed beyond all reach of ingenuity to show the contrary, by the following extract from the opinion of the Court, delivered by Mr. Justice RHODES:

"It is contended by the plaintiffs that the survey, *which is incorporated in the patent, does not accord with the decree of confirmation, and that they are entitled to rely upon the decree*—WHICH IS ALSO INCORPORATED IN THE PATENT—*for title to lands within the decree, but not within the sur-*

vey. This position cannot be maintained consistently with the views already expressed as to the nature and effect of the patent. The patent purports to convey the lands described in the survey, *and its scope cannot be extended, nor on the other hand can it be limited by showing that the decree comprised a greater or less area than the survey.*"

The Supreme Court, again, in *San Diego* v. *Allison*, 46 Cal., 162, held that when, 'after a decree is made confirming a Mexican grant of land, a survey is necessary to fix and determine the boundaries of the land confirmed, *the Courts will not go behind it and look into the decree to ascertain what are the boundaries of the grant.*

And in speaking of a *State* patent, the Supreme Court of this State, in *Churchill* v. *Anderson*, 56 Cal., at pp. 60–61, approved the following language which Mr. Justice McKINSTRY, speaking for the Court, quotes from *Doll* v. *Meador* (16 Cal., p. 325), as follows:

"If a patent be void upon its face, it may be assailed at any time and in all cases; for it is itself record evidence of the matter which renders it a nullity. If it be issued in the absence of legislation directing a disposition of the property described, or by an officer who is not invested with power to sign the same, or for an estate prohibited, its validity may also be controverted in any action, either directly or collaterally; but if the authority to issue the patent *depend upon the existence of particular facts in reference to the condition or the location of the property or the performance of certain antecedent acts*, and the officers have been appointed for the ascertainment of these matters in advance, who have passed upon them and given their judgment, then the patent, though the judgment of the officers be in fact erroneous, cannot be attacked collaterally by parties showing title subsequently from the same source, much less by those who show no color of title in themselves."

TESCHEMACHER v. THOMPSON.

Teschemacher v. *Thompson*, 18 Cal., 11, deserves the greatest consideration in this brief, as an effort is made by the Court in its opinion to distinguish it from the case at bar.

We maintain that there is not in principle the difference of a hair between the case at bar and that of *Teschemacher* v. *Thompson*. Both are actions of ejectment, and in both there is a collateral attack upon a Mexican grant patent by one sheltering himself under the State title. In both cases a survey was necessary to determine the definite location of the land granted, and in both, the surveys were had under Acts of Congress passed to carry out the provisions of the treaty of Guadalupe Hidalgo. In both cases, by those surveys, land was claimed to have been included within the calls of the survey and patent which of right ought not to have been so included, and which belonged to the State. In both cases, the grants bordered on the Bay of San Francisco, and hence as in one case as in the other it was necessary, in order to follow the decree, to find the line of ordinary high-water mark of that Bay. In the *Teschemacher* case, says the reporter of the Court, in stating the facts of the case at page 13: "On the trial it was admitted that the *patent* of the United States *embraced that part of the demanded premises which was in the possession of the defendants*," and the case showed the land to be outside the line called for in the grant and decree. Now, in the case at bar, the defend-

ant in error alleges precisely the same thing; that is, that the land in controversy *is covered by the patent, but not covered by the decree.* The contention in both cases on the part of the State is precisely the same, as will be seen by referring to the argument of counsel for the State title in the *Teschemacher* case, particularly where he says at page 18:

"We then set up title in the State of California, and show such to be the case by proving the premises in controversy to be below the ordinary high-tide water mark of the Bay of San Francisco, at the date of the admission of the State into the Union, rather between the ordinary ebb and flow of the tide at that time. The jury under the charge of the Court, having found such to be the fact, the question then is, to whom do such lands belong? We maintain, to the State of California, and never were granted to the appellants or their grantor, and that the *United States could give no title thereto, neither by patent confirming a grant nor in any other way.*"

And, then, again, to make the matter plain beyond peradventure, we have this statement by Mr. Chief Justice FIELD, delivering the opinion of the Court (pp. 21–22):

"We do not intend, however, to determine the appeal in this way. We prefer to place our decision upon grounds which will finally dispose of the controversy between the present parties, and furnish a rule for settlement of other controversies of a similar character. For that purpose we shall assume that the land occupied by the defendants, and constituting a part of the demanded premises, was, at the date of the admission of California as a State into the Union, *below the ordinary high-water mark of the Bay of San Francisco;* in other words, covered by the flow of the *ordinary or neap tides of the Bay.* Upon that assumption the land thus occupied belonged at that date to the State, unless it has been subject of a previous grant by the Mexican Government, which the United States upon the acquisition of the country was bound to protect, and which they have since recognized and confirmed. Until the acquisition of the country the land was of course under the jurisdiction, control and disposition of the former government, and the rights acquired by the United States were in sub-

ordination to the action of that government, so far as such action was entitled to consideration either from the law of nations or the stipulations of the treaty of cession. *In that respect the land under the tide waters of the bay between high and low water mark stood in no different position from that of any other land over which the former government possessed the power of disposition.*"

The Chief Justice in the opinion then proceeds to state, that under the treaty of Guadalupe Hidalgo the United States stipulated for the protection of the rights and property of the inhabitants of the ceded territory, and that by the eighth article of the treaty they provided that Mexicans established in the territory might remain there or remove to the Mexican Republic and retain their property or dispose of the same and remove the proceeds. "This provision for "the retention of the property was an idle and de- "ceptive one, if it did not carry with it a correspond- "ing obligation of the new government to protect "the property thus retained. Such obligation it did "in fact imply, and this obligation was as sacred and "binding as if it were stated in express terms."

"We are not informed," proceeds the Chief Justice, "by the record, whether it was of a specific tract "with definite boundaries, or was only of a specific "quantity lying in an area of larger extent. We "shall assume, for the purpose of the present appeal, "that it was of the latter character, and conveyed "only an interest, requiring further action of the "Government, and that such action was not had "previous to the cession. In other words, that it "conferred a merely equitable title, which was never

" perfect under the former Government. The title " still constituted property within the decision of the " Supreme Court which we have cited, and was such " as the Goverment of the United States was under " obligations to protect by the law of nations, and by " the stipulation of the treaty. This protection it " could extend in its own way. But to protect an " equitable title is to perfect it, or to afford the means " of its perfection. By the Act of March 3rd, 1851, " the Government has afforded such means. It has " there provided for protecting all titles, legal or " equitable, acquired previous to the cession. Its " powers to thus provide cannot be questioned. The " power results from the fact that it is sovereign and " supreme as to all matters connected with the treaty. " And the enforcement of the obligations incurred " thereunder are cast upon it, independent of the " treaty, by the law of nations upon the cession of the " country. It must determine for itself what claims to " property existed at that date, which it is bound to " protect, and consequently the lands to which they " apply and the parties by whom they were then held. " In protecting those claims it must necessarily make " them good *as against others asserting interests* " *from events subsequently transpiring*, otherwise the " power to carry out the stipulations of the treaty and " the obligations imposed by the law of nations would " be limited and dependent, and not sovereign and " supreme. *Subsequent claimants must, therefore, take* " *in strict subordination to its action. And such sub-*

"*sequent claimants are not entitled to any notice of* "*its proceeding*. The sovereign power can, as we "have already observed, afford the requisite protec- "tion in its own way. It can do so by direct legis- "lative Act, perfecting at once the equitable title, or "by authorizing proceedings to be taken before its "tribunals and officers, and it is under no more obli- "gation to give notice to parties asserting subse- "quently acquired interests in the one case than in "the other. *Nor can subsequent claimants have any* "*just grounds of complaint, for whatever interests* "*they may possess were acquired with full knowledge* "*of the treaty and of the obligations and powers of* "*the new Government.*"

The Chief Justice then proceeds to point out the method under the Act of March 3, 1851, by means of which those holding equitable claims under the Mexican Government could have these titles protected by the United States. And in speaking of the effect of a patent issued under the provisions of that Act, he says:

"By it, the sovereign power, which alone could "determine the matter, declares that the previous "grant was genuine; that the claim under it was valid "and entitled to recognition and confirmation by the "law of nations, and the stipulation of the treaty, and "that the grant was located, or might have been "located, by the former government, and *is correctly* "*located by the new government so as to embrace the* "*premises as they are surveyed and described. Whilst*

" *this declaration remains of record, the Government* " *itself cannot question its verity, nor can parties* " *claiming through the Government by title subse-* " *quent.*"

Speaking then of the particular patent under discussion, and which differs in no respect whatever from the patent in the case at bar, the Chief Justice says:

" The patent, therefore, to the plaintiff, considered " as issued upon a grant of the character which we " have assumed it to be, is evidence that the grantees " possessed, at the date of its cession, a vested in- " terest in the quantity of land mentioned in the " grant, a right to so much land to be afterwards laid " off by official authority; that the premises in contro- " versy were then subject to appropriation in satisfaction " of the quantity granted; and that the Government of " the United States, in discharging its duty has, through " its appropriate departments, made the appropriation, " and thereby given precision to the title of the grant- " ees, and attached it to the tract as surveyed. *The* " *'third persons" against whose interests the action of* " *the Government and patent are not conclusive, under* " *the fifteenth section of the Act of March* 3, 1851, " *are those whose title accrued before the duty of the* " *Government and its rights under the treaty attached.* " The views we have thus expressed dispose of the " present appeal. The United States, upon the ces- " sion of the country, took the premises charged with " the equitable claim of the Mexican grantees, and have " since perfected the claim into a perfect title. *But*

" *for such equitable claim the United States would have* " *held the title in trust for the new State: but, the* " *claim existing*, THE STATE AND ALL OTHER PARTIES " MUST HOLD IN SUBORDINATION *to the action of the* " *Government respecting it*. The right and the power " of the Government to protect, and thus perfect, the " equitable claim, *were superior*, as we have shown, " *to any subsequently acquired* RIGHTS OR CLAIMS OF THE " STATE *or of individuals*. Immediately upon the ces- " sion of the country the Government could have com- " plied with its obligations and at once have perfected " the claim. Subsequent events, not originating " with the grantees, can have no effect upon the valid- " ity of their claim, or of the duty of the government " respecting it."

The fact that the survey in *Teschemacher* v. *Thompson* was made under the Act of March 3d, 1851, and the survey of the Pueblo lands made under the Act of July 1st, 1864, can make no difference, because the Act of 1864, as the Act of 1851, was passed for the purpose of providing machinery by means of which equitable claims arising under the Mexican Government could be perfected, and in essence and principle they are the same. It is true that under the 13th section of the Act of 1851, the right to the patent might be contested by any person who saw fit to contest it, by presenting a petition to the District Judge of the United States for the District in which the lands were situated, and that upon such petition it might be lawful for such Judge to grant an injunction to restrain the

party at whose instance the claim to the lands had been confirmed, from procuring a patent for the same until the right thereto should have been finally decided; while in the Act of 1864 there is no provision for the Court's aiding the Land Department in exercising the administrative function of locating the land. But the most careful measures are provided by means of which all interested parties shall have notice of the fact of the survey having been made, and have full opportunity to contest it. After the claim has been surveyed and the plat made, it is the duty, under the Act of 1864, of the Surveyor-General to give notice that the same has been done, by publication once a week for four consecutive weeks in two newspapers, one published in San Francisco, and one published near the land surveyed, and shall retain in his office for public inspection the survey and plat until ninety days from the date of the first publication. If no objections are made to the survey, he must approve it, and transmit a copy of the survey and plat to the Commissioner of the General Land Office at Washington for his information and approval. But if objections are made within ninety days by any interested party, such objections must be reduced to writing and filed with the Surveyor-General, together with such affidavits or other proofs as may be produced in support of the objections. At the expiration of the ninety days the Surveyor-General must transmit to the Commissioner of the General Land Office at Washington a copy of the survey and plat and objections, and proofs filed with him

in support of the objections, and also of any proofs produced by the claimant and filed with him in support of the survey, together with his opinion thereon; and if the survey and plat are approved by the Commissioner he must endorse thereon a certificate of his approval. If disapproved by him, or if in his opinion the ends of justice would be subserved thereby, he may require a further report from the Surveyor General, or may direct a new survey or plat to be made. When the objections are disposed of, or the survey and plat corrected, or a new survey and plat are made in conformity with his directions, he must endorse upon the survey and plat adopted, his certificate of approval; and after such endorsement the Commissioner is to cause a patent to be issued to the claimant.

Thus it is seen that ample provision is made in both statutes for such procedure as will lead to a correct location of the grant. The Act of 1864 is in truth of higher legal value, in one respect, than that of 1851, for the latter makes no provision for notice to be given of the fact of survey and plat, while the former does; and as the proceeding before the Court for an injunction is not obligatory, the survey and plat might have been sent on and a patent issued, without any interested party knowing of their transmission. But it is idle to compare the relative values of these two methods of procedure; for, as stated in *Teschemacher* v. *Thompson*, the General Government could provide any means it saw fit to carry out its political obligations under the

treaty, and to those means the State of California, as a party subsequent in right, could make no objection, and is in no position to be heard. Whether the Government in discharge of these obligations shall provide that its Courts shall aid the Land Department in the matter of locating grants, or whether the Land Department shall be made to depend upon itself in the matter of such location, can make no difference whatever in principle. And hence it is that what is said by Mr. Justice PATTERSON, in the opinion delivered by him in the case at bar in regard to the manner in which the boundaries of the Teschemacher grant are assumed to have been determined, is quite irrelevant and out of the way. There is no particular sanctity surrounding a grant surveyed under the statute of 1851; nor is it a pin's fee more in value than a grant whose boundaries have been established under the provisions of the Act of 1860, or of 1864, or it be set off according to the lines of the public surveys under the Act of 1866. There is nothing, however, in *Teschemacher* v. *Thompson*, as reported, which would indicate that there was any contest over the survey in the United States District Court. For aught that appears, the patent was issued without such contest, or without the Court dealing with it in any way, as might have been the case; for, as shown above, such a proceeding was not obligatory, and was not a condition precedent to the issuance of the patent. Certainly there is not in the *Teschemacher* case, the

slightest notice taken of any such contest by counsel or by the Court.

WARD v. MULFORD.

This case (32 Cal., 365) is the *Teschemacher* case over again in all essential particulars, for defendant, claiming under a State patent for swamp and overflowed land, sought in an action of ejectment to limit the boundaries of the plaintiff's land, which was held under a patent issued on a confirmed Mexican grant. Like the *Teschemacher* case, the grant was bounded on the Bay of San Francisco, and like that case the lines of the survey included tide-land. It was hence contended by the defendant that the patent took in land which belonged to the State, and which he, as grantee of the State, had succeeded in title to. In approving *Teschemacher* v. *Thompson*, Mr. Justice SANDERSON, speaking for the Court, says, at page 370:

"From the foregoing it results that the State of California came into the Union with her claim to the land within her borders, such as she took by virtue of her admission under general grants to all the States previously made by the Federal Government, and such as might thereafter be granted from the same source, and such as she then acquired by virtue of her sovereignty, *subordinate to the prior equities of grantees under the former sovereign, and bound by such action as the Federal Government might take in ascertaining and settling such equities*. In private proprietorship and in sovereign right the United States succeeded the Mexican Government, and in both these respects California, so far as she acquired any right in either, succeeded the United States and became privy to the latter in estate in respect to all land within her borders, whether such as may be held in private or sovereign right. *In this respect no distinction can be made between the lands acquired by her through Federal grants and such as she took by virtue of her sovereignty*. In respect to the latter, as in respect to the for-

mer, the United States succeeded to the title and took it upon precisely the same terms upon which the Mexican Government held it at the date of the cession. And so of the State. If the Mexican Government had made any rightful disposition of lands which she held as sovereign, *neither the United States, nor the State as succeeding sovereign, could disregard it any more than in the case of other lands.*

It certainly seems plain enough that the cases of *Ward* v. *Mulford* and *Teschemacher* v. *Thompson* are opposite to the decision in the case at bar; and that if the two first are sound, the latter must be unsound. The three cases cannot breathe the same air and live.

Ward v. *Mulford* is even more precisely to the point than *Teschemacher* v. *Thompson*, for while in the latter case it doesn't appear by express statement that there was a variance between the decree and patent, leaving it to be inferred from the fact of the grant being bounded by the Bay that the decree so ran, in the former case it is expressly stated by Mr. Justice SANDERSON (p. 369), that the *decree followed the grant and bounded the lands on the Bay.* This boundary was necessarily the line of ordinary high water; but the surveyor, as claimed in that case, and as claimed in this, did not follow that line but went below it, and so included land which belonged to the State. Here was a direct conflict between the decree and patent, the party claiming under the State patent, that he had a right to impeach the United States survey and patent, and to show that the line of the Bay—line of ordinary high water—determined in the decree, should prevail, and so prevailing, the line as surveyed

would be found to be below that line. It should seem to be manifest beyond question, therefore, that in *Ward* v. *Mulford* "the boundaries as defined in the decree were" not "followed in the patent," and precisely the same was assumed to be so in the *Teschemacher* case, the whole controversy turning on this, and upon this alone.

Again, in the *Teschemacher* case the defendant, being in possession, relied not on paper title in himself, but upon title outstanding in the State; while in *Ward* v. *Mulford*, it was a square battle between the United States Mexican Grant Patent and the State Swamp Land Patent. The issue, hence, in the latter case, was so joined as to make *Ward* v. *Mulford*, a perfect twin to the case at bar.

In *People* v. *San Francisco*, the very question now before the Court, on the very titles here contesting for supremacy, came before the Supreme Court of the State (75 Cal., 388) and was most elaborately presented on both sides, the Court having heard the case on a rehearing, and the result was as expressed in the following extract from the opinion of the Court delivered by Mr. Justice McKinstry:

"Our conclusions are: 1. *The land, the title of the* "*United States wherein is granted by the patent to* "*the City and County of San Francisco, is the land* "*embraced in the approved survey set forth in the* "*patent.* 2. *The patent is conclusive evidence of the* "*right of defendant to all the lands embraced within* "*the survey, except that it does not affect the interests*

hence too plain for rational contradiction that no question of construction could arise in the case at bar such as demanded the attention of the Court in *More* v. *Massini*. Indeed, the very first sentences of the opinion in that case are fatal to it as an authority here.

Says Mr. Justice RHODES: "In *Teschemacher* v. *Thompson*, 18 Cal., 11, it was admitted that the patent of the United States to the plaintiff embraced the lands in controversy; and the lands in dispute in *Ward* v. *Mulford*, 32 Cal., 365, were within the lines of the survey, and were embraced by the patent from the United States. Were that the position of the lands in dispute in this case, the authority of those cases would be decisive of this. But the question here is, whether the lands in controversy — that is to say, the lands below the line of ordinary high-tide of the Pacific Ocean — *are embraced within the patent*."

Now, in the case at bar, the contention of defendants in error is, that while the patent *includes* the lands, the decree *excludes* them — an altogether different contention from that in the *More* case, for there, the only question as stated by Mr. Justice RHODES, was, as to whether the lands were "*embraced within the* PATENT." And he expressly says, that if there were no question about the land being embraced "*within the lines of the survey*," the "authority" of the *Teschemacher* and *Ward* cases "would be decisive of this." It must be obvious, we submit, that *More* v. *Massini* furnished no exception to the other cases, and so the Supreme Court of the State held in *People* v. *San Francisco*, 75 Cal., 402.

The overwhelming force of the California cases is sought to be overcome by calling attention to the fact that in some of the most noted of them the location proceedings were taken under the Act of 1866, and

that hence the judiciary were brought upon the scene, it being conceived that the judgment of the United States District Court under the Act of 1860 is more potent than that of the General Land Department under the Act of 1864. This is, indeed, to misapprehend the whole question at issue; for, as has been heretofore pointed out, these two Acts stand on precisely the same plane — both of them having been set up by Congress for the purpose of enabling the people of the United States to fulfill their treaty obligations. The judgment of one, hence, has no superior weight or force over the judgment of the other. Each tribunal was set up in turn for the same specific purpose; and when we are brought face to face with their final determinations, the only question to be answered, is that which is addressed to jurisdiction. Whether there can be more abuse of power under one Act than under the other is a false quantity in the discussion; for we can never argue a want of power from the opportunity to abuse it. If the power exists, that is an end of the discussion.

Teschemacher v. *Thompson*, *supra*, (the leading California case on the subject under discussion) seems to be entirely misapprehended by Mr. Justice Fox; for we find him speaking as follows: "Incidentally it was "claimed, and the Supreme Court held, that in that "case the boundary of the Mexican grant ran to ordi-"nary low water mark," etc. Now, it was neither so claimed, nor so held. The only claim that *could* have been made was that the *grant* extended to the line of ordinary *high* water, for the tract covered by it

was bounded by the Bay of San Francisco; but what the Court held was, that. even conceding the locating officers had gone below the line of ordinary high water, and had thus included tide land within the lines of the survey, yet the patent embracing such land could not, *on that account*, be collaterally assailed. This misapprehension is profound, and obviously goes to the root of the whole matter. In fact, we have the Justice proceeding to liken the decree *confirming* the Pueblo lands to San Francisco to the decree in the *Teschemacher* case *locating* the land covered by the grant. And from the similarity between the two, he argues that the Judicial Department of the United States has, in effect, so *located* the San Francisco Pueblo lands as that the patent is unavailable against such location. It is no wonder that such confusion should have lead to very erroneous conclusions. The decrees in the two cases are not only not similar, they are not even analogous. In the *Teschemacher* case as in the Pueblo case, there was a decree confirming the grant and determining its boundaries; but the location of these boundaries upon the ground was as imperative in the one case as in the other. In the *Teschemacher* case, the location was effected through the instrumentality of the surveyor and the United States District Court; while in the San Francisco Pueblo case, it was effected through the instrumentality of the surveyor and the General Land Department, with the Secretary of the Interior as chief supervising officer.

The State was bound to contest in the Land Department as to where the line should be run between her lands and those of the City, and she is concluded by the determination of that Department.

The survey of the Pueblo Lands was made under the Act of July 1, 1864. Under this Act, unlike under the Act of 1851, notice was required to be given, as we have shown above, of the fact of survey and platting; and under this notice any interested party is given the fullest opportunity to be heard in opposition to the survey, and is permitted to carry his opposition to the Commissioner of the General Land Office, to the Secretary of the Interior, and even to the President. Such a notice was not at all necessary in order to conclude the State, as is said in *Teschemacher* v. *Thompson* by Mr. Chief Justice FIELD; for California could only get what she was entitled to, after the rights of claimants under the treaty were fully met and satisfied; but the statute furnished a remedy in the nature of a proceeding *in rem*, whereby all the world was admonished to appear and contest as to the lines of the survey. In fact, as appears, a contest was begun in the Surveyor-General's office by interested parties, who succeeded in having the Secretary of the Interior so modify the survey as to direct a new survey to be made which should include the premises in controversy. Can such a notice be taken for nothing? Are not precisely just such notices held conclusive in probate and admiralty proceedings? and when

legally given, do they not bind the whole world? Can one, after survey and patent under this statute, be heard to say that the lines were mistakenly run? And has any one ever been permitted to say so? If he be a "*third person*" within the meaning of the Act of 1851, he can impeach the patent upon any one of various grounds; but his impeachment would rest upon some basis of prior equity, and would be directed rather at the confirmation, than at the survey made to carry the confirmation into effect. This is well illustrated in the numerous cases of overlapping patents, where the successful party never succeeds by causing a change in the lines of the two conflicting surveys, but by having it decreed that his land is protected by a prior equity. There is no question of a mistake by the surveyor involved, but rather of an error committed by the tribunal who rendered inconsistent decrees of confirmation.

Furthermore, establishing boundary lines by means of a survey involve *questions of fact;* these questions under the Act of 1864 were committed for determination as to Mexican grants, solely to the Executive Department of the United States Government. The officers of that Department, having given the notice required by law, having proceeded regularly, and within their jurisdiction, cannot, as to their finding of fact in regard to the location of the Pueblo Lands, have that finding reviewed by any tribunal whatsoever. It is well established that where a tribunal has been created for the purpose of hearing and determining dis-

puted questions of fact, the judgments of that tribunal are conclusive, and cannot be questioned directly or collaterally except for fraud, or except in a proper proceeding where it has mistaken the law.

French v. *Fyan*, 93 U. S., 171.
Churchill v. *Anderson*, 56 Cal., 60–61.

That the Land Department had *jurisdiction* to admeasure the Pueblo Lands, goes without saying, and that it did so admeasure them, cannot be disputed. If it made errors in its admeasurement, those errors cannot be corrected in a proceeding where its action is sought to be reviewed collaterally. If it had no *jurisdiction* to proceed in its work of survey, that can be shown. If, for instance, it undertook to survey one tract of land under a decree to survey another tract, its action would be void, and could be so shown; but when it undertakes to survey the particular tract of land directed in the decree, and it proceeds to survey that tract, the lines it establishes, however erroneous, must hold fast as against appeal to any other tribunal. Here, the Surveyor-General was directed to survey a tract of land, four square leagues in extent from the extreme upper portion of the peninsula of San Francisco, having the shore line for northern, western and eastern boundaries, the southern line to be fixed for quantity. This is the tract he undertook to survey and *did* survey, beyond doubt. It was matter of fact as to where the shore line was, and matter of mathematical calculation as to where the southern line should be

located. The tract could not possibly be located without this survey, as is obvious from the consideration of the grant being for a definite quantity; and the eastern line quite as imperatively demanded location, because of its artificial obliteration. The case is eminently one, therefore, where the rule should be enforced with the utmost rigor.

The rule here invoked would apply, so far as mere *location* of the lines of the grant is concerned, to all cases of Mexican grants; but in the case of one standing in the position of the State of California, who is not, as has been shown, a "third person" within the meaning of the Act of 1851, no possible doubt can exist of its application, and of its binding force as well.

II.

The Grant was Properly Located.

Even if we are wrong in our law, and it is admissible, as claimed by the other side, for the final location of a Mexican grant as evidenced by United States Patent, to be collaterally questioned in a State Court in an action of ejectment, yet the case is still with us, for the Pueblo Lands were, as matters of fact and law, properly located; that is, the survey followed the decree. As we have seen, *the east line is a call for the Bay of San Francisco*. Mission Creek was a tidal estuary of that bay and penetrated the mainland to a considerable distance. Instead of crossing the mouth of this creek, as the Land Department held should have been done, Stratton meandered up and down

its banks, and thus excluded from the Pueblo not only the bed of the stream, but the marsh, fresh as well as salt, which extended for some distance on each side of the creek. This course was wholly unwarrantable, for it was neither authorized by law, nor by the rules regulating surveys. And if this be so, defendant in error has no case; for if the line properly crosses the creek then the lot in controversy is within the pueblo boundaries. This is shown by the map and by course 91 of the survey as given in the patent. (Transcript of the Record, fol. 30.) And indeed, it is admitted that the patent includes within its exterior boundaries the land in question. (Fol. 13, Transcript of Record.) Around this it was, that the controversy in the Land Department raged the hottest; and that Department held, firmly and consistently, from first to last, following in this Sherman Day, the United States Surveyor-General, who sent on the Stratton Survey with his objections to it. *that no part of the marsh or of the creek, was any part of the Bay of San Francisco*; and that the Pueblo line had been in effect determined under the Water Lot Act of 1851, wherein it had been necessary to establish the very line of ordinary high water mentioned in the decree. In accordance with these decisions the patent was issued. Under this head of the argument we deem it well to make extracts from the decisions of the Secretaries of the Interior, and from them it can be gathered that the decree was exactly followed in the Von Leicht survey,

and was unwarrantably deviated from in that of Stratton.

The first decision is that of Secretary SCHURZ, reversing the decision of Commissioner WILLIAMSON, and was rendered March 3d, 1881, and from that decision we extract as follows:

"Survey of the claim was made by Deputy Surveyor James T. Stratton between March, 1867, and January, 1868, except the military reservations, which were surveyed by Mr. Stratton in 1866.

"The survey and plat were approved by Surveyor-General Upson, August 13, 1868, and were duly advertised in August and September of the same year, in accordance with the provisions of Section 1, Act of July 1, 1864, and were retained in the office of the Surveyor-General for the public inspection until the expiration of ninety days from the date of the first publication.

"The approval of the survey and plat by Surveyor-General Upson prior to giving the notice required by law was unauthorized, and they must be treated as if no certificate or approval were attached.

"A protest against the approval or said survey, and objections thereto, in due form of law, and evidence in support of the same, were filed in time by the City and County of San Francisco. General E. O. C. Ord, as Commander of the Military Department of California, also filed objections within the ninety days to so much of the survey as related to the Presidio Military Reservation, with proofs in support of the same.

"On the 25th of November, 1869, Surveyor-General Day forwarded the official plat, and on the 14th of the following month he transmitted a copy of the field notes and other papers relating to the survey, and the objections and proofs, together with his opinion sustaining some of the objections, and holding that the plat should be amended:

"1st. By a resurvey of the southern and eastern boundary of the Presidio.

"2d. By the insertion of two or three small tracts at the Mission Dolores.

"3d. By including the marsh lands within the four square leagues.

"4th. By changing the southern boundary for quantity.

* * * * * * * *

"Under the fifth paragraph of the protest the city and county ob-

jects to the survey, because it excludes a tract of land north and west of Brannan Street, which is represented on the plat as covered by water. The protest alleges that this tract was, on the 7th of July, 1846, almost wholly a tract of overflowed land, mostly salt marsh, and hardly any of it overflowed by tide-water except at spring tide, and was almost wholly above ordinary high-water mark; that the line of ordinary high-water mark was at that time on the side of the bay sharply defined by a growth of samphire, a marine reedy plant which grows down to the line of ordinary high-water, and no further, and that said line of ordinary high-water mark, as it existed July 7, 1846, was the same as that laid down on the premises and defined by a blue pencil line on an engraved map of the United States Coast Survey, as surveyed by A. F. Rodgers, sub-assistant, in 1857, which map is duly marked and filed as a part of the protest.

"John W. Dwinelle, who went to San Francisco in 1849, and who has since for most of the time practiced law in that city; Henry Teschemacher, who went to San Francisco in 1842, and has for the most of the time since resided there, and who was Mayor of the City in 1860, 1861, 1862 and 1863; Alfred Robinson, who went to California in 1829, and has for several years resided in San Francisco; Charles Brown, who went to reside in San Francisco in 1829, and has since been familiar with the boundaries of the peninsula; and William P. Humphreys, who went to San Francisco to reside in 1849, and has resided there ever since, and who was formerly City Surveyor, and is now City and County Surveyor; all of whom show an early knowledge of this tract, commencing about the time they respectively went to the City, have testified in this matter and their testimony supports fully the foregoing allegations.

"In addition to these witnesses, Augustus F. Rodgers, testifies that since 1851 he has been stationed in California (except eighteen months between 1867 and 1869) in charge of the United States Survey of the coast thereof, including the peninsula of San Francisco; that the engraved chart or map filed with the protest was prepared and published from his surveys; and that the line laid down on that map in blue pencil from Steamboat Point around Mission Bay to Point San Quentin, and crossing Mission Creek, is, according to the best of his recollection and belief, a true delineation of the line of ordinary high-water mark as it existed when he first knew it in 1852. The other witnesses also swear, to the best of their recollection and belief, that this blue line represents the line of ordinary high-water mark at that place, and the map certainly represents most of the tract above described as above that line.

"Surveyor Stratton reports that, on account of the natural and artificial changes that have take place in the water-line of the City since its occupation by the Americans, in establishing the line of ordinary high tide 'from the Point San Jose military reservation to the mouth of Mission Creek,' he was compelled to rely entirely upon the first official map of said City, made by William M. Eddy, the first City and County Surveyor. He accompanied his field-notes with what he calls a 'traced copy' of the water-line portion of said map certified by the present City and County Surveyor. That so-called traced copy is in the papers, and is certified thus:

"I hereby certify that the blue line on this map, from A to B, and and thence following the line marked c, c, c, correctly represents the line of ordinary high-water mark around the City of San Francisco, as delineated on the original official maps on file in this office.

"GEO. C. POTTER,

"City and County Surveyor."

"The certificate is dated May 28, 1867. The line marked c, c, c, is the one that represents high-water mark north and west of Brannan Street, and excludes the tract in question.

"It may be here remarked, that this certified line does not embrace any of the tracts returned as 'salt marsh,' which the Stratton survey excludes, and certainly was not a guide in surveying out these parcels; and it should not be confounded with the certified 'description of the lines of segregation of salt marsh and tide lands' found among the papers, and upon which Mr. Stratton relied.

"You held that the evidence of the six witnesses above mentioned should hardly be allowed to overthrow an official survey made so many years before under so favorable circumstances. Undoubtedly, to approximate the line of ordinary high-water mark around the City of San Francisco, from Point San Jose to or south of Mission Creek, reliance must be had upon the early surveys to a great extent; but it seems to me that the evidence is sufficient to cast a doubt upon the correctness of this certified line, and to put the Department upon inquiry as to whether that certificate is the best evidence the nature of the case will admit of. An examination of the lines of high-water mark, delineated upon the plat thus certified, will not impress one with evidences of great care and accuracy in its preparation, and although Mr. Stratton calls it a traced copy of the water-line portion of Mr. Eddy's 'first official map of said City,' it is not certified as a copy of any map whatever, but simply that the blue line correctly represents the line of ordinary high-water mark, as delineated on original

official maps. The evidence, therefore, upon which Mr. Stratton relied for establishing this portion of the line of the confirmed claim, consists mainly in this certificate.

"The description of the tract in question is not sufficiently definite in the protest to admit of an accurate survey of the high-water line therein claimed, and it may be that the evidence relied on by Mr. Stratton is the best that can be now found, but that it was error to survey out the two gores north and west of Brannan Street seems clear to me, if there is any reliance to be placed in human testimony. But I think the question may be solved by a careful examination into the records and maps of the office of the City and County Surveyor.

"By an Act of the Legislature, passed March 26, 1851, the State designated all lots within a certain specified boundary as the San Francisco Beach and Water Lots, and granted the use and occupation of the same to the City for ninety-nine years. The beginning of this boundary was at the point where the east line of Simmons Street intersected the southern boundary line of the City; thence northerly and westerly, by lines of streets, around the City to the western boundary line thereof; thence southerly along the latter line 'to natural high-water mark; *thence along the line of the said high-water mark to its point of intersection with the southern boundary line of said City.*' This line of high-water mark ran considerably south of Mission Creek, and it is longer than that certified by Mr. Potter.

"The fifth section of this act provided that the City should within thirty days after its passage deposit in the offices of the Secretary of State and the Surveyor-General, 'and in the office of the Surveyor of the City of San Francisco, a correct map of said boundary line * * * distinctly and properly delineated by a red line.'

"That a map was made and deposited as required by this act there can hardly be a doubt; for this boundary line is recognized in the Acts of May 1, 1851, May 18, 1853, May 1, 1855, and March 30, 1868, the latter act referring to and recognizing 'the red line water front of Mission Bay.'

"I am still further confirmed in this opinion by a certified copy of this 'red line map' filed by Messrs E. R. Taylor, Jarboe & Harrison and E. J. Pringle, claiming to represent sundry lot-owners under pueblo or City titles. The certificate shows that the red line represents the boundary line of the beach and water lots described in section one of the said Act of March 26, 1851, and that it was delineated in accordance with the fifth section of said act. The original certificate is signed by John W. Geary, Mayor, and William M. Eddy, City Sur-

veyor, and bears date April 4, 1851. The whole is certified as a correct copy by William P. Humphreys, the present Surveyor. The red line on this map, representing 'natural high-water mark,' shows nearly all of the tract now under consideration, and all of the tract returned as salt marsh by Mr. Stratton above the mouth of Mission Creek, to be above this line.

"Another map filed with you, entitled 'Map of the salt marsh and tide lands and lands lying under water south of Second Street,' etc., certified as correct by the Board of Tide-Land Commissioners, the State Board and the State Surveyor-General in 1869, has also this red line partly around Mission Bay laid down upon it, showing most of the tract in question, as well as said tract of salt marsh, to be above high-water mark.

"If these plats could be received as evidence, the objections as to these two tracts could be disposed of at once by directing the Surveyor-General to make this Eddy red-line map the basis of the survey around that part of the confirmed claim.

"But it is sufficiently clear to my mind that such map exists, and represents a line of ordinary high-water mark that has been established, sanctioned and recognized in the most solemn manner by the State and the City for years; and if this line was not actually surveyed in 1851, it must have been established from the early and most reliable surveys, and is, doubtless, the best available evidence of the line of ordinary high-water mark of 1846 around that portion of the City.

"You will, therefore, direct the Surveyor-General to secure a correct, authentic copy of the map designating the line of 'natural high-water mark,' made in accordance with the said Act of March 26, 1851, and make it the basis of a survey of so much of the exterior boundary of the claim as it represents.

"The ends of this line should be connected with the line of the Stratton survey (in case they should not coincide therewith) in such manner as to most nearly preserve the line of ordinary high-water mark, making the connection by the shortest possible lines.

"The objection under the ninth paragraph of the protest need not be considered further than to remark that it will stand or fall, in whole or in part, by the establishment of the line as above directed.

"Paragraphs 6, 7 and 8 of the protest relate to the following tracts of salt-marsh excluded from the survey, viz: the tract above the mouth of Mission Creek, the one bordering on Islais Creek, and the one adjoining the Presidio reservation. The survey is objected to because these tracts were not included, it being alleged that they were above ordinary high-water mark July 7, 1846.

"In my opinion, the testimony of the above-named witnesses fully sustains the objection.

"In surveying around these tracts, Mr. Stratton relied mainly upon field notes certified by Mr. Potter, City and County Surveyor, thus: 'The within is a description of the lines of segregation of salt-marsh and tide lands in San Francisco County, according to the surveys returned to the Surveyor-General.' The certificate is without date, and does not show when the surveys were made, nor that they were ever approved. They could not have been early surveys. They could hardly have been made under the Act of April 23, 1855, providing for the sale of swamp and overflowed lands, because the sale of such lands within ten miles of San Francisco was prohibited by that Act. Swamp lands in the City and County of San Francisco were also excluded from the provisions of the Act of April 12, 1858, providing for the sale and reclamation of swamp and overflowed lands. If they had been made under these Acts, it would be evidence of the tracts being above high-water mark. (*People* v. *Morrill*, 26 Cal., 354.)

"But the strong probability is, that the surveys referred to by Mr. Potter were made under the Act of April 13, 1861. If so, the fact itself is proof that the tracts were above high-water mark in 1850. The Act provided for 'the reclamation and segregation of swamp and overflowed *salt marsh and tide lands donated to the State by Act of Congress.*' If these tracts had been below ordinary high-water mark they would have passed to the State by virtue of her sovereignty and not by Act of Congress. (See cases above cited as to line of high-water mark.) The Act created a board for reclaiming these lands, and in Section 19 provided that county surveyors should, immediately after the organization of that board, 'proceed to segregate' such lands '*from the highlands*,' and make complete maps thereof within their respective counties; and the 20th Section provided that one copy of the survey and map should be retained by the County Surveyor, and that another should be filed with the Surveyor-General. This is the first act that I find making these requirements, and the language of Mr. Potter's certificate would seem to leave hardly any room to doubt that the filed notes certified to were of surveys under this act.

"In the case of *Rondell* v. *Fay* (32 Cal., 364), the Court says:

"'Salt marsh' was first used to designate a class of lands belonging to the State in an act passed May 13, 1861 (Act 1861, p. 361, Sec. 27), and we understand the term as applying to a certain class of 'swamp and overflowed lands' held by the State under the 'Arkansas Act' of September 28, 1850. (26 Cal., 352.)

"Nothing is clearer to my mind than that these tracts are above the

high-water mark of 1846, and they should be included in the survey as a part of the area of the four square leagues.

"You will therefore direct the Surveyor-General to amend the survey accordingly."

* * * * * * *

A motion having been made before Secretary TELLER for a review of the foregoing decision of Secretary SCHURZ, that Secretary, in denying the motion, rendered the following decision, to which we beg the particular attention of the Court, because the decision of Secretary SCHURZ is therein strongly reinforced by illustration and argument:

"*Secretary Teller to Commissioner Farland:*

"July 12, 1883.

"SIR—I have considered a motion for review of the decision rendered by Mr. Secretary Schurz March 3, 1881, in the matter of the survey of the pueblo lands of San Francisco, setting aside, as to the particulars named, what is known as the Stratton Survey, executed in 1867, and directing a new survey of the line of high-water mark on the Bay of San Francisco, taking as a basis what is designated as the 'Red Line' of the original shore, as delineated by authority of an Act of the Legislature of California, approved March 26, 1851.

"The motion for review was duly presented under the permission of the Department in April, 1881, with a request that the matter or argument be left open for the consideration of whatever questions might arise in the further progress of the case, and was formally renewed in September, 1882, by counsel for the parties interested in the approval of the Stratton survey, and, after full oral and written argument, the whole case has been regularly submitted for my decision.

"Having complete jurisdiction of the case, as shown by the authorities cited on page 4 of the former decision—also *Maguire* v. *Tyler* (1 Bl., 195, and 8 Wall., 650), *Van Reynegan* v. *Bolton* (95 U. S., 33), *Snyder* v. *Sickles*, (98 U. S., 203), and other cases—I propose to give such direction in the matter as will lead to an intelligent execution of the survey, at the same time limiting the expression of my views to the exact points presented by the pending application.

"The right to the pueblo title and possession rests in the City of San Francisco, by judicial confirmation, sanctioned and ratified by legislative grant. (*Trenouth* v. *City and County of San Francisco*, 100

U. S., 251.) The case just cited contains not only a clear and concise statement of this particular grant, but of the Mexican custom and law in which such title originated. The Acts of Congress referred to are those of July 1, 1864 (13 Stat., 333), and March 8, 1866 (14 Stat., 4), the latter of which released all claims of the United States upon certain trusts, and by direct reference to the decree of the Circuit Court of the United States, rendered May 18, 1865, which specified the boundary calls of the grant.

"The descriptive language of the decree is this:

"The land of which confirmation is made is a tract situated within the County of San Francisco, and embracing so much of the extreme upper portion of the peninsula above ordinary high-water mark (as the same existed at the date of the conquest of the country, namely, the 7th of July, A. D. 1846), on which the City of San Francisco is situated, as will contain an area of four square leagues; said tract being bounded on the north and east by the Bay of San Francisco, on the west by the Pacific Ocean, and on the south by a due east and west line drawn so as to include the area aforesaid.

"All material questions relating to this boundary are, as I understand the case, now settled, except the single inquiry whether or not in running along the line of ordinary high-water mark of the ocean, and especially of the bay, the main shore or coast line of such body of water, identified by its larger description, shall be followed, cutting across the mouths of streams, estuaries, and creeks which, intersecting the body of the peninsula, find their entrance into the said ocean or bay; or whether such estuaries as also fall below high tide shall be segregated by following up the tide line on one side and down on the other, so as to map them, as it were, as a part of the sea, and to measure only the land surface thus articulated and segregated, to obtain the area called for by the grant.

"My predecessor held that the former was intended by the decree and expressed its true construction. The applicants for review adhere to and insist upon the latter interpretation.

"Mission Creek, so called, running into Mission Bay, an interior part or portion of the Bay of San Francisco, presents the principal locality of the controversy; although several other streams are also affected by the tidal flow, and strips of land along their banks are, or were in 1846, submerged by the ordinary high tides. All these lands are now reclaimed, and covered by the streets, blocks, and buildings of the City. It is sufficient for this case to fix the meaning of the decree as to Mission Creek; for, if that be excluded as a boundary,

all the other streams and lesser channels will, by the same rule, fall within the exclusion.

"It is broadly contended that the controlling words of the decree are those first occurring, viz, "embracing so much * * * above ordinary high-water mark * * * as will contain an area of four square leagues;" that this is descriptive of the lands with reference to every part and parcel of the same wherever situated, and draws to itself every subsequent mention of boundary, so as to compel us to treat all the waters below high tide in any part of the peninsula as forming 'arms of the sea' which must be considered as a part of the sea named for boundary, and 'meandered' out for quantity, in obtaining the area which governs the location of the south side of the grant. Others concede that possibly the fact of navigability of the estuary may have some bearing, but claim that if the stream was navigable it necessarily formed a part of the bay called for, and its high-tide line must be taken in surveying out the land.

"To my mind, both these views are extreme, and at variance with the intent and language of the decree. These first words of description are of the land as 'a tract,' a 'portion of the peninsula' referred to as a whole, by reference to its situation 'above ordinary high water' of the surrounding ocean and bay; description of the land as such 'peninsula,' and only intended to set out the location and situs of the grant, lying there as a portion of country within well-known natural water boundaries and rising above *their* ordinary lines of high tide. This peninsula was confirmed as a tract granted for municipal purposes, for the uses of a prospective and growing city, which, at date of confirmation, had already achieved more than its early promise. Manifestly, such a grant must take whatever is inland, with respect to the bodies of water surrounding it — whatever might or should attach to its municipal uses — and, if traversed by a water-course, everything not strictly belonging to the public easement, to the *jus publicum* as recognized by the law of nations, would naturally fall within the municipal right. To change or limit this natural and persuasive presumption of intent, words of clear and unmistakable import must be used — not words which may reasonably find full interpretation in the opposite view.

"Now, when we look at the calls for boundary there is no ambiguity, no doubtful phraseology: 'Said tract being *bounded* on the north and east by the Bay of San Francisco, on the west by the Pacific Ocean.' The 'tract' *bounds* upon the '*bay*' and '*ocean*,' not upon estuaries, creeks and streams intersecting such tract, even though they be navigable and technically termed 'arms of the sea'.

"I have examined the full list of authorities cited and brought to my attention at the argument and subsequently, and have no question to raise respecting them in a case to which they apply. Those on which great stress is laid are Hunt's Law of Boundaries, 16, 17; 8th Alabama, 1 to 24; 16 Peters, 251, 266, 267; 6 Cowan, 518, 540; 2 Wallace, 590; 94 U. S., 324. In all these cases the arm of the sea, or the stream itself, was the given boundary, and the only thing decided was that the title reached only to high-water mark, all beyond that resting in the rights of riparian proprietorship, subject to the public easement.

"But, as before stated, this is another case. Here the boundary is not the stream, but the bay, consequently, the 'ordinary high-water mark' must be the high-water mark of the shore as pertaining to the sea, and not the high-water mark of the bank as pertaining to a river or stream. So that, although Mission Creek is alleged to have been as well a tidal inflow as an outlet for the inland waters, it nevertheless falls within banks instead of resting upon shores, and must be considered an inland water for all purposes, being far within the rule laid down in *United States* v. *Grush* (5 Mason, 290), and clearly covered by the late case of *United States* v. *Steam Vessels* (No. 141, October term, 1882).

"To the foregoing may be added the rule long since established by the United States Coast Survey, as communicated by the Superintendent under the date of 8th ultimo, in response to my request for information on the subject. I subjoin this letter:

"U. S. COAST AND GEODETIC SURVEY OFFICE,
"WASHINGTON, June 8, 1883.

"SIR: In further illustration of the statement made by this office under date of June 5, in answer to your letter dated May 31, 1883, concerning the practice of this office in defining the inner boundaries or outlines of bays when the same are interrupted by the mouths of estuaries, rivers, or creeks, I submit the following additional statement:

"This office has long since had occasion to adopt definite rules in that respect for the purpose of making estimates for projected work and giving account of work done.

"The rule adopted is to draw the line between high-water mark of the nearest points of land on each side of the interruption in continuation of the general outline.

"Thus making use of familiar illustrations on the Atlantic Coast, the general coast line is measured from Point Judith to Montauk Point; from Coney Island to Sandy Hook; from Cape May to Cape

Henlopen; from Cape Charles to Cape Henry. On the Pacific coast from Point Lobos to Point Bonita (San Francisco entrance), etc.

"Descending to smaller features: In Long Island Sound the limits of the Sound are defined by measuring across the mouth of the Thames River from high-water mark at Eastern Point to Quinipeag Rocks; across the mouth of the Connecticut River from high-water mark to Griswold's Point (Lyme) to Lynde's Point (Saybrook); in Delaware Bay, across Mahon's River between the opposite points of marshes. By the same rule we define the limits of Mission Bay, near San Francisco, by drawing the line across Mission Creek over the projecting points of marsh on each side.

"It appears needless to multiply illustrations, and I trust that I have succeeded in setting forth the rule and practice of this office.

"Very respectfully, yours,

"J. E. HILGARD,

"Superintendent.

"Hon. Henry M. Teller,

"Secretary of the Interior, Washington, D. C.".

"From the foregoing it will be seen that although no suggestion was made to him as to localities, the inquiry being in the most general terms, the Superintendent has instanced this very case as illustrative of the accepted rule. It can hardly be claimed, therefore, that a call for San Francisco Bay, being a larger description than Mission Bay, will demand the inclusion of an estuary of the latter which by the ordinary rules of boundary has been excluded from other designation than that of a mere creek flowing into the lesser bay, but actually considered as forming no portion of such bay designated as a distinctive body of water.

"Let it be supposed for further illustration that instead of penetrating the peninsula for a short distance, Mission Creek had held by the same course and width, within its own banks, entirely across the land and connected as a channel with the Pacific Ocean on the west. Would it in such a case be claimed that this channel formed, as an arm of the sea, one of the boundary calls of the decree? Manifestly, not; but the line of the shore would be followed around the peninsula, cutting both mouths, in continuation of the general course of the high-water boundary of the entire tract. And if this be so, it must follow that the lesser incident of an intersecting channel, within such banks on the one side cannot operate to require its notice as a boundary, and an exclusion of its area from the quantity of the grant.

"I am aware that I have extended the consideration of this point to an unusual length; but in view of its importance and of the time

and labor expended in its discussion, as well as of the misapprehension which it seems to me must exist in the minds of counsel who have appeared in support of the Stratton survey, I have thus sought to set at rest the conflicting theories concerning it. To me it is plain that the confirmation extends to the high-water mark of the shore of the bay, leaving entirely out of the intention of the decree any reference whatever to the inland channels of the streams intersecting the granted peninsula; that the adjudication of the boundary goes to the settlement of the rights of the City, not only by relation as to the date of filing of the petition with the Board of Land Commissioners, but that it goes to 'the title of the claimant as it existed upon the acquisition of the country.' (*Beard* v. *Federy*, 3 Wall., 478.) This adjudication necessarily postpones the State, even in the exercise of her tide-water sovereignty, to the right of these claimants under the City; and but for the public character of the works made by or under State authority to improve the public easement and water front of the City, which works have also been co-operated in by the City herself, the title might probably be held to extend through riparian proprietorship to the present line and shores of the bay.

"But, fortunately, there is no need to extend this question to that limit. The one thing for this Department is to find such shore line of high-water as it existed in 1846. To this end my predecessor directed that the 'red line map' be made the basis of the survey. I do not regard this as commanding an inflexible adherence to such map, but construe it as intending to require that the former shore of the bay be followed, and not the banks of estuaries and streams. If at any point the red line traverses the land above the tide line, manifestly the tide line must be the boundary. So, also, where the line may chance to lie beyond the shore out in the water of the bay, the tide line must still govern. But following such tide line in its general course along the shore as it then existed, it must cross the mouths of these estuaries, including Mission Creek, at the points where the banks of the stream came down to the bay, though such banks may have been composed of marsh lands and were subject to tidal overflow as banks of the streams.

"It is objected that this creek was from 140 to 270 feet in width and navigable. So, many streams are miles in width navigable, and below high tide for many miles from their mouths; but they are not excluded from the area of tracts of land bounded by the shores of the superior bodies of water into which they flow at various angles. My predecessor intended simply to direct that Mission Creek be not made an exception to this general use.

"It is alleged that the same was declared navigable by Act of the State Legislature, March 31, 1854. I am unable to perceive in this fact any support for the theory that it was regarded as a part of the bay. The language of the statute is that 'the creek known as Mission Creek in the County of San Francisco, from its mouth as far as the tide flows, shall be declared a navigable stream.' It is designated as a creek, described as within the county, referred to as having a mouth, and declared to be a stream. By sections 2 and 3 of the same Act it is again identified as a creek.

"This statute in itself shows the opinion of the State Legislature to have been according to the actual fact; not that this creek formed a part of the Bay of San Francisco, and a boundary of the peninsula, but that it was an inland stream within the body of the county; and the Court of Sessions was expressly authorized by the Act to license bridges and ferries across such stream, provided navigation should not be thereby impeded. Had this been deemed a body of water instead of a stream, its mouth would have been denominated an entrance, and all the descriptive terms which would have corresponded to the proper appellation of a bay, gulf, or sound, as the case might be. I cannot conceive how a claimant under the State can set up a construction so plainly at variance with what was obviously the legislative understanding in defining this water as a stream, known as a creek, and made subject to bridging and ferriage, with a saving only of the easement attaching to other navigable streams.

"I might here dismiss this review, without alluding to the partial execution of the order of my predecessor; to the liberties taken with his instructions by the late Surveyor-General, and to the repeated efforts of various parties to force the Department to an acquiescence in the subsequent proceedings had and reported. I have only to say that I do not look with favor upon an attempt to carry into effect by inference and evasive construction the execution of a survey so manifestly at variance with both the letter and spirit of the directions of the former head of this Department.

"It is said that great interests are involved, calling for intervention or such recognition as to incline me to listen to appeals of various property owners under the title granted by the State of California. I am not unaffected by proper considerations, where large and material interests must suffer from official action; yet being but the minister of the law, cannot yield my convictions of duty to favor such interests, however or in whomsoever vested. But here are opposing interests, each clamoring for interposition. I can but execute the decree of the

authorities confirming the grant, construing whatever of doubt it may present according to my best individual and official judgment.

"If the claimants under the State have a valid title, it is the duty of the Department to recognize that fact, no matter how great the injury to those holding under the pueblo title. The latter have occupied and improved the lands in controversy by the erection of fine and valuable buildings. They have become the homes of a large number of persons of small means, who acquired their title through the pueblo title, and who for years lived in ignorance of any adverse claims. The claimants under the State rely upon their naked legal rights, and demand their recognition by the Department, without reference to the hardships such recognition will cause to those *bona fide* purchasers under the pueblo title. As before stated, it is my duty to recognize the legal rights of the State claimants if clearly established: but it is also my duty to require sufficient and convincing proofs of such rights before rendering a decision that will disturb titles and deprive the occupants of their lands, their homes and their places of business. This Department can and ought to have cognizance of the fact that long before the claimants had made a pretense to ownership, the occupants were claiming the lands under the pueblo title, and by their money expended in improving them the same became valuable, and their acquisition desirable to claimants.

"For a nominal sum they now hope to acquire property worth millions of dollars, rendered thus valuable by the money and labor of those they now seek to despoil.

"Before lending my aid to enforce naked legal rights of this character the proofs must be made exceedingly clear and conclusive. But, fortunately, in this case I have no difficulty in determining that the claim of the parties holding under the State is not only without legal right, but subversive of equity and justice; and I cannot permit myself, with the authority of the Department committed to my charge, to assist a claim based upon such considerations in overthrowing the settled rights of the community, appropriating their property, and their very homes, in the manner which would result from a modification of the decision already made.

"On the other hand, if the parties holding the State title have made improvements under such title, they are not without their remedy, inasmuch as the City is but the trustee of such occupants, who may, at a nominal figure, secure a title from the city authorities to the premises so occupied.

"Leaving in force the decision of August 2, 1882, as to the eastern

boundary of the Presidio military reservation, a review of which was declined October 26, 1882, I also direct a substantial adherence to my predecessor's decision of March 3, 1881, a review of which is sought by the present application, which motion for review is accordingly overruled. In executing the survey the suggestions herein expressed will be carried into effect."

(Decisions of Department of Interior, relating to public lands, Vol. II, pp. 346–353.)

After this decision was made, the parties claiming under the State insisted that the Secretary should make special findings of fact in the case, and therefore Secretary TELLER made the following findings and decision:

DEPARTMENT OF THE INTERIOR,
Washington, October 18, 1883.

To the Commissioner of the General Land Office:

SIR—On the 3d day of March, 1881, the then Secretary of the Interior, after a careful examination of the law and facts, decided the case relating to the matter of the survey of the Pueblo Lands of San Francisco, and directed a survey of said lands to be made, taking as the basis for such survey what is designated as the "Red Line Map" of the original shore, as determined by authority of an Act of the Legislature of California, approved March 26, 1851.

In the month of April following, a motion for review was presented, with the permission of the Department, by the parties who contended for the Stratton survey.

After a very careful examination of the law and facts in this case, on the 12th of July last, I adhered to the views expressed by my predecessor in his opinion of March 1, 1881. Just before the signing of my decision of July 12, 1883, the counsel for the claimants under the State applied to have certain facts found for the purpose, as they declared, of enabling them to maintain their cause in the courts. In my decision of July 12th, I endeavored to state explicitly on what ground I understood my predecessor had rested his decision, and to express my adherence to the same views. Since such decision the claimants under State title insist that the findings of fact in the several decisions in the case are not sufficiently explicit to enable the Court to determine what are the facts on which these decisions are based, and again renew their request for special findings. On the 14th of August last, the

Assistant Secretary, acting in my stead, directed a stay of proceedings, until otherwise directed. This was for the purpose of allowing time to consider the request of the parties for special findings. Such request for special findings included:

"*First*—We ask that the decree of the Court of the 18th of May, 1865, by which the Pueblo lands were confirmed to the City of San Francisco, shall be fully found and set forth."

This was done, as will be seen from an examination of the decisions.

"*Second*—We wish the fact that the red line map existed before the red line was drawn upon it, and before the Act of the Legislature was passed in 1851, which brought the red line into existence."

That the red line map, so called, did exist before the red line was drawn on it, was doubtless proved by the testimony.

The act of March 26, 1851, referred in terms to an existing survey and a "map or plat of the same now (then) on record in the office of Recorder of the county." (Hittell, Sec. 4227.)

"*Third*—We wish the fact to appear that the red line was made as indicating the front and inner boundaries of the beach and water lots, leased by the State to the City of San Francisco for ninety-nine years, and was not made for the purpose of marking the line of ordinary high water."

As the red line was not adopted as the actual line of survey by my predecessor, but was required to be taken as the "basis of a survey," and as in my order I distinctly directed the Surveyor General to make his survey on the basis of the red line, and not by it, using it only as the means of determining the shore line at high-water mark and indicating the general line of the shore at the time the red line was put on the map, I am of the opinion that the second and third requests are immaterial, and I decline to find on them further than I have already done, except to say, that as the red line marked both the inner and outer boundary of the water lots claimed by the State, and leased to the City, the fact would seem to be that all parts of it stood alike in relation to the State title as a boundary, and its inner portions were as controlling and material touching the State claim as the outer boundaries of the said lots on the newly adopted shore line. The boundaries were continuous, and were described by a single line extending around the tract at various angles, by reference to an already completed survey and map, so far as related to the blocks and streets, and running as to other portions by ship's channel and the line of high-water mark. It was a statutory boundary, all the courses and distances of which were prescribed by the Act, and extended from the point of beginning

at the intersection of the line of Simmons Street and the southern boundary line of the City, to the intersection of the described lines of Jefferson and Larkin Streets, and "to the natural high-water mark" on the western boundary line of the City. The course is then fixed by description "thence along the line of said high-water mark to its point of intersection with the southern boundary line of said city—being the identical inner line, which I am asked to find "was not made for the purpose of marking the line of ordinary high-water."

In view of this law of the State I am not required to find as a fact what was its purpose—that being a matter to be judicially determined from the language of the Act itself. I could not, therefore, find as requested, even if the question became material to the decision of the case before me.

"*Fourth*—That what is known as the red line drawn upon what is known as the red line map was not the result of any survey, but was simply traced by Eddy without making actual survey."

This is not at all material to the question at issue, and I decline to find specially on that point.

"*Fifth*—That to follow the red line marked by this William M. Eddy will carry the line of the survey, made in execution of the said decree of the 18th of May, 1865, at certain places (designating them), out into the deep see, and at other places over high lands and rocky hills."

There is some proof to sustain this request, but it is not at all material, inasmuch, as the red line is not to be followed by the survey in all respects, but only to be taken as the basis of such survey; and I, therefore, refuse to find further on that point than I have done.

"*Sixth*—That on the 7th of July, 1846, Mission Creek was at its mouth 275 feet wide, with an average width of 140 feet; that it extended up a mile and a quarter from the mouth or the place where the red line crosses it; that throughout its entire length the daily tide regularly ebbed and flowed; that the same was navigated by sloops and small schooners and other craft; and that said creek was not an outlet for fresh water, except the surface drainage of the adjacent hills during the rainy season; that it was declared a navigable stream March 31, 1851, by an Act of the Legislature of the State of California, and that its depth at low tide at the mouth where the red line crosses it was (3) feet, and at high tide about (9)."

It was conceded by the decision that Mission Creek was as well a tidal inflow as an outlet for the inland waters, and it was recited that it was of a certain claimed width and navigable; also that it had been by Act of the State Legislature declared a navigable stream. I decline

to find further as as to the exact amount of outflowing water, or the exact distance from its mouth to which the tide reached. The whole decision sets out my deliberate judgment, that notwithstanding the admitted facts it was not in law excluded from the grant.

"*Seventh*—That all this land described in the last paragraph as Mission Creek, was covered by the daily tides of the sea or bay."

Whether the waters of the bay at any time covered over all the lands now claimed by the State, is a matter of some doubt; but it is undoubtedly true, that when the creek was swollen by rains, the tide did increase the volume of the water in said creek, and overflow the banks thereof to some extent, but I am not satisfied that it did to the extent claimed by the counsel for claimants. But whether the tide did so flow or not, over the lands claimed under the State title, is immaterial in the consideration of this case; as Mission Creek does not, and never did, constitute any portion of the Bay of San Francisco, the boundary of the Pueblo on the North and East; and a survey will not be correctly made, that follows the windings and meanderings of said creek, so as to exclude from the Pueblo the lands in said creek.

"*Eighth*—That this land so within Mission Creek is excluded from the lands of the State, and given to the Pueblo lands of the City by the decision in this case."

This has been fully answered in the answer to the sixth request.

"*Ninth*—Find, as a matter of fact from the testimony, that the other portions of the disputed lands which, by the decision in this case, are given to the city as Pueblo lands, were below that part of the shore of the bay to which the waves ordinarily reached when the tide is at its highest, and in this finding designate the portions of the shore which were in July, 1846, so covered by the ordinary reach of the waves when the tide is at its highest."

I do not find as a fact the statement made in this request. None of the lands included in the Pueblo by the decision of March, 1881, or July 12, 1883, are below "ordinary high-water mark of the bay of San Francisco," which is the boundary line on the north and east.

"*Tenth*—Find the fact that on the day of 1867, Stratton made the survey known as the Stratton Survey, and designate in this finding of fact where the line as established by Stratton falls, finding also the history of that survey as to its return to the Land Office, etc., and that it was confirmed according to the facts disclosed by the record."

"*Eleventh*—Find the fact that Surveyor-General Wagner, on the day of 1881, made a return to the Land Office, with his approval, of a survey of this line, and find where, as a matter of fact, that line

falls upon the earth's surface, and trace its position with Stratton's lines and with the line you approve in this case."

The action of Stratton and Wagner is immaterial in the consideration of this case, unless such action had been approved by the Department; and I decline to find as requested in the tenth and eleventh requests.

"*Twelfth*—Find as a fact that this survey is one which is to be made and executed under the Act of Congress of July 1, 1864. Thirteenth Statutes, 332."

This is admitted; and the decisions already made assume, as matter of law, that such is the requirement of the Statutes.

"*Thirteenth*—Find as matters of fact, all the steps that were taken in this case, taking an appeal to the Secretary in regard to the boundary of the Pueblo lands, and also what acts on the part of the City of San Francisco were done in resistance or dismissal of the appeal."

An answer admitting the foregoing to be true, is not the finding of facts material to the determination of the cause, but the recital of what the files ought to show, if true; and such finding would not be higher evidence than the files of the Department; and it is immaterial what the City of San Francisco has done in relation to such appeal. I therefore refuse to find as to that.

The counsel representing the claimants under State title contend that these findings are necessary to enable them to go into Court and fully protect the interests of their clients. Counsel appear to have lost sight of the fact that my decision was based on a motion to vacate the order made by my predecessor on the 3d day of March, 1881. I declined to accede to the request, and left the original action as it stood, and as the Surveyor-General's survey must be approved by me before it becomes final, and as there had been some difficulty heretofore in having this survey promptly made according to the direction of my predecessor, I took occasion to give my views somewhat fully by way of direction to the Land Office. I find no difficulty in determining what my predecessor did direct, and the survey could readily have been made in accordance therewith. I have both in my decision of July 12th, and in this, endeavored to make it clear what my views are on this question, and just how the survey should be made, and suggest that you inform the Surveyor-General that he is expected to make the surveys in accordance therewith, and that he be directed to make such survey within twenty days after he receives this order, and that he without delay return the survey for approval. I return the papers in question.

Very respectfully,

H. M. TELLER, Secretary.

After all this, the Von Leicht survey was made and patent issued in accordance therewith. Thereupon a motion was made before Secretary Lamar for the recall and cancellation of the patent, and the issue of another patent in accordance with the Stratton survey. In response to that motion the Secretary delivered an elaborate opinion, wherein he took pains to set out the history of the controversy, and as matter of law held that he had no power to recall the patent. But beyond all this he held that the Von Leicht survey was correct, and in so ruling, delivered himself as follows:

Secretary Lamar to Commissioner Sparks:

"March 12, 1887.

"This is an application for the recall and cancellation of the patent of the United States to the City of San Francisco, and for the issue of a new patent with different boundaries, to-wit: the boundaries of what is known as the Stratton survey. From the papers transmitted by the Land Office, and the authorities cited in the briefs of counsel, I learn that the history of this case is as follows:

"In July, 1852, the City of San Francisco, as the successor of the Mexican pueblo of that name, petitioned the Board of Land Commissioners of California, created under the Act of Congress, March 3, 1851 (9 Stat., 631), for a confirmation of her claim to four square leagues of land situated on the northern portion of the peninsula of San Francisco. After a controversy before the Board of Land Commissioners, and in the Courts for a period of nearly thirteen years, the United States Circuit Court finally confirmed the claim of the petitioner, to the land therein described, as valid. The following is an abstract from the decree:

"The land of which confirmation is made is a tract situated within the County of San Francisco, and embracing so much of the extreme upper portion of the peninsula *above ordinary high-water mark* (as the same existed at the date of the conquest of the country, namely: the seventh day of July, A. D. 1846), on which the City of San Francisco is situated, as will contain an area of four square leagues; *said tract being bounded on the north and east by the Bay of San Francisco, on the west by the Pacific Ocean, and on the south by a due east and west line*,

drawn so as to include the area aforesaid, subject to the following deductions, namely: such lands as have been heretofore reserved or dedicated to public uses by the United States, and also such parcels of land as have been, by grants from lawful authority, vested in private ownership and have been finally confirmed to parties claiming under said grants by the tribunals of the United States, or shall hereafter be finally confirmed to parties claiming under said grants by said tribunals in proceedings now pending therein for that purpose; all of which said excepted parcels of land are included within the area of four square leagues above mentioned, but are excluded from the confirmation to the City. *This confirmation is in trust for the benefit of the lot-holders under grants from the Pueblo, town or City of San Francisco, or other competent authority, and as to any residue, in trust for the use and benefit of the inhabitants of the City.*"

"On the 8th of March, 1866 (14 Stat., 4) Congress relinquished the land covered by the decree to said City. Thus the title of the City rests upon the decree of confirmation and the Act of Congress, both making the City a trustee for the lot holders and inhabitants thereof.

"Upon the confirmation of this grant and its approval by the Act of Congress, the next matter for the consideration of the Land Department related to its extent and boundaries. In 1867–8, under the instructions of the United States Surveyor-General of California (Upson) the survey of the claim of the City was made by the Deputy Surveyor, James T. Stratton, and a plat thereof, were filed in the office of the Surveyor-General of the United States for California. Due notice thereof was given in the legal manner, and for the required time, by said Surveyor-General. The survey and plat were approved by him, but not in the manner and form required by the statute.

"Against the approval of the survey the City and County of San Francisco filed their protest and objections thereto, with the evidence in support of the same in due form of law. One of the grounds of protest the one involved in this inquiry, was that the surveyor did not conform, as required by the statute, to the decree of confirmation, in that he did not follow the line of ordinary high-water mark of the bay, but followed up the tide line, or rather the alleged tide line on one side and down the other, of Mission Creek, a stream which runs into the bay, excluding certain marsh lands lying on Mission Creek, which ought to have been included in said survey. Said survey and plat, together with the said protest, objections, evidence, field notes and other papers were transmitted by Surveyor-General Day, successor to Surveyor-General Upson, to the General Land Office at Washington, with his own report thereon in which he disapproved of said survey,

expressing the opinion that the said objections were, in several particulars, well taken, and recommended that the plat and survey should be amended, among other things so as to include the marsh lands lying on Mission Creek within the four square leagues, which said Stratton survey had excluded therefrom. I give the following quotation from his report:

"'And, further, in relation to the above-mentioned survey by Deputy Surveyor Stratton of the exterior limits of the Pueblo Lands of San Francisco * * * I express my opinion that they are erroneous and not in conformity with the decree of the United States Court and the Act of Congress relating thereto, my reason for this opinion being more fully set forth in a communication to the Commissioner of the General Land Office, dated July 8th, hereto appended.'

"Speaking of the objections to the exclusion by this survey of the marsh lands as being below the ordinary tide line, he says: 'the affidavits sustain the exception, and I can add to them the fact that in 1851 or 1852 I assisted in surveying a preliminary trial (line) for the San Jose Railroad across this marsh, and found it to be as described in the affidavits and I have seen no facts around the bay to prove that it has filled up and become tide marsh lands since 1846.'

"For some reason not explained in anything that I have found in the records, the Stratton survey and plat remained in the General Land Office, unacted upon, for ten years. In the meantime one Geo. W. Ellis, obtained from a Board of Tide Land Commissioners (appointed by the State to take charge of its swamp and tide lands, to sell portions of the same and to compromise with parties in possession thereof) a quit-claim deed of the State, at the rate of $4.00 for one thousand square feet to a tract of land which embraced a considerable part of the lands on Mission Creek, excluded by the Stratton survey. Soon after this C. C. Tripp, a grantee of Ellis, brought suit in the Circuit Court of the United States of California to recover a lot included in the said quit-claim deed of the State Board. The opinion of the Court rendered in this case as reported in 5th Sawyer's Report, page 209, was that the lot in controversy was situated within the limits of the tract confirmed by the decree of the Circuit Court above mentioned to the City of San Francisco. In this opinion the Court said:

"'Mission Creek never constituted any portion of the bay of San Francisco, any more than the Sacramento River constituted a portion of the Bay of Suisun, or the Hudson River a portion of the Bay of New York." Again: 'The boundary of that tract (meaning the tract confirmed to the City by the decree), *runs along the bay* on the line of ordinary high-water mark, as that existed in 1846, *crossing the mouths*

of all creeks running into the bay, and that of Mission Creek among others.'

"When this matter was before my predecessors it was contended that this opinion was not entitled to the force of a decision, among other reasons, because it was filed after the action had been dismissed. This contention is based upon an affidavit filed in the Department by C. C. Tripp, the party litigant, against whom the decision was made in said opinion. From the evidence of L. S. B. Sawyer, clerk of the Circuit Court in which the opinion was pronounced, and of Edw. J. Pringle and Alexander Campbell, counsel for the defendant, contradicting and refuting the statements in Tripp's affidavit, I cannot doubt the truth of the statement in the note appended to the opinion in 5th Sawyer, at page 216. That note is as follows:

"'The decision in the above case was given orally, the presiding Justice stating at length his views, and observing that he would at a subsequent day file an opinion embodying their substance. A day was then fixed for counsel to prepare the findings, but soon afterwards the case was settled, and the suit dismissed by stipulation of parties.'

"The fact that this decision was orally given and subsequently written out and filed when the case was dismissed, in no respect, I think, affects its character as an exposition by a judge of the law. It is a practice common to all courts to deliver oral opinions and subsequently to write them out. The authoritative force of such an opinion, will, of course, depend upon the circumstances of the case in which it is given, the deliberation attending it, the learning of the judge, the issue made by the record, and many other conditions entirely irrespective of the stage of the case or the time when the entry of judgment is made.

"It seems, however, that the action of the court in this case was not regarded in the General Land Office as *res adjudicata* in the matter of the correctness or incorrectness of the Stratton survey. For, some months after it was made (November 11, 1878), the Commissioner of the General Land Office, J. A. Williamson, rendered his decision confirming the Stratton survey (2 C. L. L., 1234). From this decision an appeal to the Secretary of the Interior in behalf of the City and in discharge of its trust to the lot-holders and for the benefit of its inhabitants, was taken by the attorney appointed to prosecute the case for the City as the trustee of the lands claimed. Whereupon the Board of Supervisors, who had previously indicated their purpose not to appeal from said decision of the Commissioner of the General Land Office, passed a resolution characterizing said action by said attorney as unauthorized, and discharged him from his office.

"A short time afterwards they unanimously passed a resolution addressed to the Secretary of the Interior, that, in the opinion of said board, the Stratton survey was the only legal and proper definition of the boundaries of the City, and should be finally confirmed by the Interior Department. Indeed, the Board of Supervisors reversed the position taken in the original protest of the City against the Stratton survey when it was completed, and used their utmost endeavors, by resolutions and other acts, to have the same approved.

"Secretary Schurz, however, held that neither these resolutions, nor any other acquiescence by the municipal authorities of the city, nor any assumption by the State of California of the correctness of said survey, could relieve him of his duty, under his supervisory or appellate authority, to see that the decree of the United States Circuit Court was properly executed by a survey in conformity with the boundaries prescribed therein.

"On the 3d day of March, 1881, he filed his decision in the case, in which he substantially sustained the objections contained in the original protest of the City to the running of the boundary line up Mission Creek and then down it.

"The opinion concludes as follows: 'your decision upon the entire survey of the claim, confirmed by said decree and Acts of Congress, except as herein modified, is affirmed.' The modification alluded to was his direction, in conformity to the recommendation of Surveyor-General Day, that the line of ordinary high-water mark of the bay should be followed, and not the banks of Mission and other creeks; but that said creeks should be crossed at their mouths in following the line of the bay. To this end he directed that a map, known as Eddy's Red Line Map, should be made the basis of said amended survey, which map, the Secretary claimed, had been established, sanctioned and recognized in the most solemn manner by the State laws and by the City for years, and contained the best available evidence of the line of ordinary high-water mark of 1846, around that portion of the City.

"Soon after the conclusion of Mr. Schurz's term of office and Secretary Kirkwood's appointment as Secretary of the Interior, an application to the latter was made for a rehearing, in support of which a report from the Surveyor-General's office was brought to his attention, referring to certain representations of Deputies Minto and Allardt setting forth that the red line on Eddy's map, as ordered by Mr. Schurz, could not be followed; that the said red line diverged widely from ordinary high-water mark, at one point extending two hundred feet out into the bay; at another, running along the side and on the top

of the bluff; and at still another, at an elevation of sixty-eight feet above tide-level; and that the marsh lands near the mouth of Mission Creek were reached by the ordinary high tides, and totally submerged, from one to eighteen inches, by about one hundred and twenty tides every year.

"To this petition for a re-hearing, based on these reports from the Surveyor-General's office, Secretary Kirkwood issued an order to the the Commissioners of the General Land Office, in these words: 'I desire the survey, *ordered by my predecessor, to be made at once*, according to the best judgment of the Surveyor-General. When so made, it will be a proper subject for consideration by your office and the Department. You will so instruct the Surveyor-General immediately.'

"Mr. Teller, who had become Mr. Kirkwood's successor, was informed that the Surveyor-General of California was not making the survey ordered by Mr. Schurz, but was disregarding that order under what he construed to be the discretion vested him by the words, 'according to your best judgment.' Thereupon Mr. Teller telegraphed the Surveyor-General to suspend his operations. But, inasmuch as the survey and field notes had been returned to his office, he — notwithstanding Mr. Teller's order — platted and sent it forward to the Department with his approval. The survey thus made was substantially a repetition of the Stratton survey.

"Another application was made by Messrs. Shellabarger and Wilson, attorneys for claimants under the Stratton survey, to Secretary Teller, that the whole matter be reheard and the survey made by Allardt and Minto confirmed. This motion was orally argued before Secretary Teller on the 11th day of December, 1882, and on July 12, 1883 (2 L. D., 346), he rendered his decision, in which he substantially confirmed that of his predecessor, and directed that 'in running along the line of ordinary high-water mark of the bay, the main shore or coast line of such body of water, identified by its larger description, shall be followed, cutting across the mouths of streams, estuaries and creeks which, intersecting the body of the peninsula, find their entrance into said ocean or bay.'

"Instructions in accordance with this decision were issued by the Commissioner of the General Land Office to the United States Surveyor-General of California, in obedience to which the deputy-surveyor, F. Von Licht, proceeded to make a survey of said lands, a map of which, with his report, was sent to Washington. Said deputy-surveyor, however, in certifying that it was in accordance with instructions received, stated that it was his belief, based upon close inspection

of the ground and investigations made, that the survey was not in accordance with the decree of the United States Circuit Court.

"As a part of the history of this case it is proper to state that before action was taken in the Land Office on this survey, a mandamus was sued for, in the Supreme Court of the District of Columbia, on the relation of the City and County of San Francisco, to compel the Commissioner to issue the patent in accordance with the Stratton survey, upon the ground that the original opinion of Land Commissioner Williamson, approving that survey, was final, and that no appeal lies to the Secretary of the Interior in the matter of surveys of private land claims. The Court, after argument, denied the writ.

"A resolution was also introduced in the 48th Congress for the purpose of interfering with the issue of any patent based upon any other than the Stratton survey. Upon this latter resolution the Judiciary Committee made a report holding that the Secretary of the Interior was the supervisory head of the Department; that the Commissioner of the Land Office was his subordinate; that no action of the latter is beyond the reach of appeal to the former; that the Secretary of the Interior had good reason for deciding that the boundary line of San Francisco must run along the bay and cross the mouths of estuaries and creeks from headland to headland thereof; and if the grantees of the State or others had superior rights to those of the City, they could assert them in the courts of the country without any legislative assistance, and therefore recommended that the resolution lie on the table.

"Pending these proceedings in the Court and Congress, the Von Licht survey was approved by the Commissioner of the General Land Office, and on June 20, 1884, the patent of the United States in accordance therewith, was issued to the City of San Francisco, signed by the President, recorded in the Department, forwarded to the Mayor of San Francisco, and accepted in behalf of the City and County. The City, now, by its attorneys, insists upon the correctness and legality of said patent and protests against its cancellation and the issue of any other patent.

"The decisions of Secretaries Schurz and Teller, above referred to, were made after hearing extended argument by counsel, and after elaborate examination. Every important consideration bearing upon the subject which has been pressed upon me was fully presented to them. The correctness of the Stratton survey itself; the recognition of the Stratton survey by the Supervisors of the City; their acquiescence in numerous acts of the State assuming the Stratton survey to be

correct, and the consequent estoppel upon them to contest its correctness; the conclusiveness of the approval of the survey by the Commissioner of the General Land Office; the refusal of the Supervisors of the City to order an appeal from his decision; the consequent invalidity of the action of the City Attorney in making an appeal or attempting to make one; the want of any appellate authority whatever over the General Land Office respecting matters of survey of private land claims; the impossibility of complying with the directions given by Secretary Schurz and reiterated by Secretary Teller for the new surveys; were all argued before the two Secretaries above named and were disposed of by them in carefully prepared opinions.

"I am now asked to treat this consideration and judgment of my predecessors, as well as the opinion pronounced by the Judge of the Circuit Court of the United States, as recorded in the official reports of its decisions, as of no validity; to hold that my predecessors had no jurisdiction to review the act of the Commissioner; that the Circuit Court had no jurisdiction to render the decision it pronounced; and that the Commissioner of the General Land Office was the only officer clothed with lawful authority to determine the validity of the survey of the land confirmed to the City. In other words, I am called upon to disregard as null the action of my predecessors, and to reopen the question as to the title of the City to the land covered by the patent issued to it.

"It is to be observed that this application does not ask that I, as the supervising authority of this Department, should review and correct its previous action in a case undisposed of and still pending in the Department. The question presented is whether when a contest for title is once closed by the issue of a patent to a claimant, which is accepted by such claimant, the jurisdiction of the Secretary of the Interior over that title continues. In other words when the Land Department, acting within the scope of its authority, issues a patent which is delivered to and accepted by the grantee, the Secretary of the Interior has the right to annul that patent and issue another and a different one in its stead."

The Secretary then carefully reviews the authorities and reaches the conclusion that he was without power to recall the patent. He proceeds, however, to hold that even had he the power, he would decline its exercise, as in his opinion the land had been properly located. We extract again as follows:

"But even assuming that I have full authority to do what this application asks, I feel that it is my duty to say that I concur fully with Secretary Schurz and Secretary Teller in holding that the Stratton survey was erroneous both as to law and fact; and also in deciding that the boundary line of the City of San Francisco as fixed in the decree of the Circuit Court must run along the bay and cross the mouths of Mission Creek and other creeks from headland to headland. The law controlling such cases is well settled. What the surveyor had to do was to set off a tract of four square leagues on the extreme upper portion of the peninsula of San Francisco above high-water mark, as the same existed at the date of conquest, July 7, 1846, *bounded on the north and east by the bay of San Francisco*, on the west by the Pacific Ocean, and on the south by a due east and west line drawn so as to include the four square leagues. The only difficulty in making this survey seems to have been the 'high-water mark of the bay of San Francisco, as it existed on the 7th of July, 1846,' as the eastern boundary of the City.

"Mr. Stratton, in his report as quoted by counsel for the applicants, says:

"'On account of the natural and artificial changes that have taken place in the water-line of the City of San Francisco since its occupation by the Americans, in establishing the line of ordinary high-tide from the Point San Jose Military Reservation to the mouth of Mission Creek, I was compelled to rely entirely upon the first official map of said City—the map made by Wm. M. Eddy, the first city and county surveyor. A traced copy of the water-line portion of said map, certified by the present city and county surveyor, Geo. C. Potter, on which the distances to the water-line at the different angles, as measured on said map, are marked, and which was the basis of my calculations of the meander lines, will accompany these notes.'

"It is apparent from this extract, first, that it was impossible to survey this line in the open field; and, second, that this part of the survey, as reported by Stratton, was copied by him from a map, and not done in the open field. If the natural water-line of the bay had been so effaced that it could not be found by actual inspection, it was his duty to seek for the evidence of its original position, and so run the survey as to make its line coincide with the natural line called for in the grant. Now, it is in evidence in this case that, as early as 1852, a survey of the natural high-water mark of this bay had already been made by officers of the United States Government, charged with this duty by statute and by executive order, for the purpose of establishing the coast line itself for all purposes relating to governmental adminis-

tration. The following affidavit is on file among the papers in this case:

"'In the Department of the Interior. In the matter of the survey of the pueblo lands of San Francisco.

"'UNITED STATES OF AMERICA, } ss.
"' District of California, }

"'Augustus Rodgers, first being duly sworn, deposes and says: that since 1851 he has been stationed in California (except eighteen months between 1867 and 1869), in charge of the United States Survey of the coast thereof, including the peninsula of San Francisco; that the traced chart or map entitled, 'Map showing the line of ordinary high-water along the eastern side of the peninsula of San Francisco from Rincon Point to and including Islais Creek, as surveyed by the Coast Survey of the United States, 1852,' hereto annexed, was prepared from the published surveys of the Coast Survey of the United States, and that the line laid down on that map in blue pencil, *from Rincon Point, around Mission Bay, to and including Islais Creek, and crossing Mission and Islais Creeks, is a true delineation of the line of ordinary high-water mark as it existed when he first knew it in the year* 1852.

"'And deponent further saith that, in determining a boundary line stated as the line of 'ordinary high-water mark,' on the Bay of San Francisco, there can be no other course than to follow the stated line of ordinary high tide on the *shore of the bay crossing the mouths of all inferior tidal streams or estuaries, many of which enter into San Francisco Bay at different points, and not to follow the meanders of any such inferior tidal streams or estuaries.* * * *

"'AUG. F. RODGERS.

"'Subscribed and sworn to before this 25th day of November, 1882.

"'[SEAL.] L. S. B. SAWYER,

"'Commissioner and Clerk of the U. S. Circuit Court, 9th Judicial Cir-
"'cuit, Dist. Cal.'

"It thus appears that the survey of San Francisco Bay made by the officers of the Coast Survey, included the line of high water mark, the very line called for in this case as the eastern boundary of the City, and that the line established in this survey crossed Mission Creek, thus coinciding with the line indicated by Eddy's Red Line Map which Secretary Schurz directed as the basis of the amended survey ordered by him. The charts and records of this survey, made under the most thorough and scientific methods, were on file in the office of the Coast Survey of San Francisco, standing on the very tract of land the boundaries of which it was Stratton's duty to define. It is by no means unusual for United States authorities and State authorities, and

for individuals having property interests along our coast lines to appeal to the records of the Coast Survey for data to identify and establish such original landmarks and boundary lines along the coast, which the hands of men in the course of settlement and industrial development have effaced. Since this case came before me a controversy between the authorities of the State of Delaware and those of the State of New Jersey respecting the division line between Delaware River and Delaware Bay has been submitted to the officers of the Coast Survey and the line designated by these officers has been adopted by the authorities of these two sovereign States.

"In view of the high scientific character of this bureau, and of the fact that it is charged by the Government with this duty, Mr. Teller addressed an inquiry as to the rules governing that bureau in the survey of public waters. The following is the answer of the Superintendent to that inquiry:

"'U. S. COAST AND GEODETIC SURVEY OFFICE,
"WASHINGTON, June 8, 1883.

"'HON. HENRY M. TELLER,
"'SECRETARY OF THE INTERIOR, WASHINGTON, D. C.

"'SIR: In further illustration of the statement made by this office under date of June 5th, in answer to your letter dated May 31, 1883, concerning the practice of this office in defining the inner boundaries or outlines of bays when the same are interrupted by the mouths of estuaries, rivers or creeks, I submit the following additional statement:

"'This office has long since had occasion to adopt definite rules in that respect for the purpose of making estimates for projected work and giving account of work done.

"'The rule adopted is to draw the line between high water mark of the nearest points of land on each side of the interruption, in continuation of the general outline.

"'Thus, making use of familiar illustrations on the Atlantic Coast, the 'general coast line' is measured from Point Judith to Montauk Point; from Coney Island to Sandy Hook; from Cape May to Cape Henlopen; from Cape Charles to Cape Henry. On the Pacific coast, from Point Lobos to Point Bonita (San Francisco entrance), etc.

"'Descending to smaller features: In Long Island Sound, the limits of the Sound are defined by measuring across the mouth of the Thames River from high water at Eastern Point to Quinipeag Rocks; across the mouth of the Connecticut River, from high-water mark at Griswold's Point (Lyme) to Lynde's Point (Saybrook); in Delaware Bay, across Mahon's River between the opposite points of marshes.

By the same rule we define the limits of Mission Bay, near San Francisco, by drawing the line across Mission Creek over the projecting points of marsh on each side.

"'It appears needless to multiply illustrations, and I trust that I have succeeded in setting forth the rule and practice of this office.

"'Very respectfully yours,

"'J. E. HILGARD,

"'Superintendent.'

"Mr. Teller adds the following just observations:

"'From the foregoing it will be seen that, although no suggestion was made to him as to localities, the inquiry being in the most general terms, the Superintendent has instanced this very case as illustrative of the accepted rule. It can hardly be claimed, therefore, that a call for San Francisco Bay, being a larger description than Mission Bay, will demand the inclusion of an estuary of the latter, which, by the ordinary rules of boundary, has been excluded from other designation than that of a mere creek flowing into the lesser bay, but actually considered as forming no portion of such bay designated as a distinctive body of water.'

"'Again: Here the boundary is not the stream, but the bay; consequently the 'ordinary high-water mark' must be the high-water mark of the shore as pertaining to the sea, and not the high-water mark of the bank as pertaining to a river or stream. So that, although Mission Creek is alleged to have been as well a tidal inflow as an outlet for the inland waters, it nevertheless falls within banks instead of resting upon shores, and must be considered an inland water for all purposes; being far within the rule laid down in *United States* v. *Grush* (5 Mason, 209), and clearly covered by the late case of *United States* v. *Steam Vessels* (No. 141, October Term, 1882).'

"This last case, cited by the Secretary, is reported in 106 United States Reports, at page 607, under the name of *Porter* v. *United States*. One of the questions was: Is James River an inland water, so that property captured upon it is subject to the Act of Congress of March 12, 1863? The Court says:

"'James River is an inland water in any sense which can be given to the term 'inland.' It lies within the bodies of counties in Virginia. For miles below Richmond, and below the obstruction mentioned, a person can see from one of its banks what is done on the other. Rivers across which one can thus see are inland waters. It matters not that the tide may ebb and flow for miles above their mouths; that fact does not make them any part of the sea or bay into which they may flow, though they may be arms of both.'

"Holding these views, I am of the opinion that the resurvey by Von Licht, on which the patent was issued to the City of San Francisco, was properly ordered."

Nothing can be added to the foregoing decisions, and the arguments therein contained. Each one is in its own way masterly, and is absolutely conclusive as to the correctness of the Land Department's location of the Pueblo Lands here in controversy. Argument of our own, in addition to that contained in these decisions, would be quite superfluous.

III.

This case comes here on a record which is singular, to say the least of it. The Referee finds in Finding Twelfth (XII) that Surveyor General Upson *duly* approved Stratton's survey, whereas the historical fact is, as shown by Secretary SCHURZ, *supra*, that Upson's approval was in advance of the statutory publication (Sec. 1, Stat., July 1, 1864, 13 Statutes at large, 332), and hence, to use the Secretary's language, it "*must be treated as if no certificate or approval were attached.*" The historical fact is, as the foregoing decisions of the Secretaries show, that after the statutory publication was made, the City filed her protest, and supported that protest by evidence, Surveyor-General Day, who had succeeded Upson, transmitting the plat with his disapproval of it, and with his recommendation that a new survey be made in accordance with the contention of the City.

In this same finding it is found that Commissioner WILLIAMSON approved the Stratton survey, but it is not

found, as was necessary under the Act of July 1, 1864, *supra*, in order to constitute approval, *that he endorsed upon the survey and plat a certificate of his approval;* and the historical fact is, that he did not. *He withheld his certificate pending the proceedings on appeal from his decision to the Secretary of the Interior*, and as the Secretary reversed him, his certificate of appeal was never endorsed on the survey and plat. This, indeed, is apparent from an inspection of the plat, which is made a part of the record, and also from the statement in the record at Fol. 9, that the survey was confirmed "by the *decision*" of Commissioner WILLIAMSON. The only survey and plat certified as approved were those of Von Leicht, which were so certified by Commissioner MCFARLAND. It is not found as a fact that Commissioner MCFARLAND gave this approval, (although historically we know it to be so); but by the clearest implication this is deducible from Findings Fifteen (XV) and Sixteen (XVI); for we have it there found that after the survey had been made as directed by the Secretary of the Interior, the patent was issued accordingly. Now, as the statute provides that after the survey and plat "have been "approved by the Commissioner of the General Land "Office, *it shall be the duty of the said Commissioner* "*to cause a patent to issue* to the claimant as soon as "practicable after such approval," and as the Commissioner *did* cause the patent to be issued, by the clearest implication he must have endorsed on the plat and

survey his certificate of approval, and such is the historical fact.

As to no appeal having been taken by the City, the historical fact is otherwise, as is apparent from what Secretary LAMAR says *infra;* but be this as it may, an appeal by the United States was regularly pending before Secretary SCHURZ, which carried the whole survey with it. But independently of this, no appeal was necessary to give the Secretary jurisdiction, as held by Secretary LAMAR, from whose decision we again extract as follows:

"In view of the earnestness with which it is insisted that the Secretary of the Interior has not the power to reverse the action of the Commissioner upon the survey of a private land claim pending before him, I deem it proper to pass upon the proposition for the purpose of putting it at rest, at least until it has received an authoritative determination superior to my own.

"By various acts of Congress the powers of the Department are clearly defined.

"These acts are, so far as it is necessary for me at present to consider them, embodied in the Revised Statutes. Title XI treats of the Department of the Interior, and makes the Secretary of the Interior the head thereof. The second chapter (Section 441) declares that the Secretary is charged with the supervision of public business relating to many subjects, among which are enumerated 'public lands, including mines.' The third chapter (Section 453) provides as follows: 'The Commissioner of the General Land Office shall perform, under direction of the Secretary of the Interior, all executive duties appertaining to the surveying and sale of the public lands of the United States, or in any wise respecting such public land, and also such as relate to the private claims of lands and issuing patents for all (grants) of lands under the authority of the Government.'

"The position of the applicants against the authority of the Secretary to review the decision of the Commissioner of the General Land Office rests upon the ground that the action of the Commissioner, in passing upon the correctness of surveys of private land claims, is a quasi judicial proceeding, and therefore not subject to review, as no

appeal to the Secretary in such cases is specially provided. Passing upon the correctness of surveys of private lands made by subordinate officers necessarily involves the exercise of judgment, and may properly be called a quasi judicial proceeding; but it is not the less a proceeding taken in the discharge of an executive duty by the Commissioner, within the meaning of Section 453, and as such under the direction of the Secretary by the express terms of that section. It is also under the supervision of the Secretary by virtue of Section 441, as a proceeding relating to the Public Lands, inasmuch as a Government survey of a private claim is necessary to segregate the lands included within the grant from the public domain.

"There seems to be some misapprehension as to the meaning of term 'executive duty.' The executive duties of any one of the Departments are such as are required of its officers in the administration of the law upon the subjects under its jurisdiction. They are not the less executive duties, because they require in their performance the examination of evidence and the exercise of judgment thereon. All executive duties which are anything beyond the performance of ministerial acts involve the exercise of judgment, such as examination, decision and final judgment, but they are not judicial acts in the sense that they can only be the subject of review by judicial tribunals or upon a formal appeal to some higher judicial authority. There is hardly any act of any moment performed in an executive Department which would not, if such were the case, be taken from the supervision and control of its head. The statutes, in placing the whole business of the Department under the supervision of the Secretary, invest him with authority to review, reverse, amend, annul, or affirm all proceedings in the Department having for their ultimate object to secure the alienation of any portion of the Public Lands, or the adjustment of private claims to lands with a just regard to the rights of the public and of private parties. Such supervision may be exercised by direct orders or by review on appeals. The mode in which the supervision shall be exercised in the absence of statutory direction, may be prescribed by such rules and regulations as the Secretary may adopt. When proceedings affecting titles to lands are before the Department the power of supervision may be exercised by the Secretary, whether or not these proceedings are called to his attention by formal notice or by appeal. It is sufficient that they are brought to his notice. The rules prescribed are designed to facilitate the Department in the despatch of business, not to defeat the supervision of the Secretary. For example, if, when a patent is about to issue, the Secretary should discover a fatal defect in the proceedings, or that by reason of some

newly ascertained fact the patent, if issued, would have to be annulled, and that it would be his duty to ask the Attorney-General to institute proceedings for its annulment, it would hardly be seriously contended that the Secretary might not interfere and prevent the execution of the patent. He could not be obliged to sit quietly and allow a proceeding to be consummated which it would be immediately his duty to ask the Attorney-General to take measures to annul. It would not be a sufficient answer against the exercise of his power that no appeal had been taken to him, and, therefore, he was without authority in the matter.

"The case of *Butterworth* v. *Hoe* (112 U. S. 50), does not at all conflict with this view. There the words 'supervision and direction' of the Secretary were not held to give jurisdiction to revise the action of the Commissioner of Patents in issuing a patent, for the reason that the law had provided an appeal from the decision in such cases to the Supreme Court of the District of Columbia. The provision for that mode of review necessarily operated as a limitation to what would otherwise have been the natural meaning of the term 'supervision and direction.' Said the Court, after referring to the legislation on the subject: 'Congress has thus provided four tribunals for hearing applications for patents, with three successive appeals, in which the Secretary of the Interior is not included, giving jurisdiction in appeals from the Commissioner, to a judicial body, independent of the Department, as though he was the highest authority on the subject within it. And to say that, under the name of direction and superintendence, the Secretary may annul the decision of the Supreme Court of the District, sitting on appeal from the Commissioner, by directing the latter to disregard it, is to construe a statute so as to make one part repeal another, when it is evident both were intended to coexist without conflict.'

"The language of the Act of July 1st, 1864, which provides for the issue of a patent after the approval of the survey by the Commissioner of the General Land Office, is to be read in connection with the Revised Statutes subsequently adopted, placing all the business relating to the survey of private claims under the direction and supervision of the Secretary.

"The argument based on the change of the mere verbiage of the statute of 1849 to the words contained in the Revised Statutes, does not impress my mind. It applies with as much force to the Indian Bureau as to the Land Office. If admitted, the Secretary would be not only deprived, except in one or two instances, of any appellate power over all the bureaus of the Depart-

ment, but shorn of any power which renders his supervision and direction effectual. No case has been brought to my attention supporting a construction so directly against the practice of the Department, and which, if sustained, would work such a radical change in its organization. On the contrary, running through the decisions of the Supreme Court, as well after as before the Revised Statutes, this appellate power is recognized and asserted as clear and undeniable. Such recognition and assertion is distinctly made in the cases already cited for another purpose. Among numerous cases, that of *Lee* v. *Johnson*, (116 U. S., page 48) decided in the October term of 1885, may be cited. In that case one Enos Johnson entered the land in controversy under the homestead laws; on account of certain acts which one Lee contended amounted to an abandonment of the land, contest was initiated between Johnson and Lee. The Commissioner decided in favor of Johnson, and, on appeal, the decision was reversed by the Secretary of the Interior and the entry ordered to be cancelled. The case coming before the Supreme Court on appeal, the Court uses the following language: 'So in the present case, the Secretary of the Interior came to the conclusion, from the evidence returned by the Register, that Johnson must be considered not as a *bona fide* homestead claimant acting in good faith, but as one seeking, by a seeming compliance with forms of law, to obtain a tract of land for his son-in-law who had previously exhausted his homestead privileges, observing that the element of *good faith* is the essential foundation of all valid claims under the homestead law. Under these circumstances, so far from having exceeded his jurisdiction in directing a cancellation of the entry, he was exercising only that just supervision which the law vests in him over all proceedings instituted to acquire portions of the public lands.'

"Such being the nature and extent of the supervisory and directory authority of the Secretary, he had jurisdiction to revise the action of the Commissioner upon the survey of the claim of the City of San Francisco, whenever his attention was called to it, whether in a formal way by appeal, or in any other manner. In point of fact, an appeal was regularly and formally taken from the decision of the Commissioner by the special attorney of the City. It is true the Supervisors, in whom the legislative power of the municipality lies, voted not to appeal from the decision, but the special attorney rightfully regarded the City as a trustee for the lot-holders, to whose benefit the confirmation inured. The concluding terms of that confirmation are: 'This confirmation is in trust for the benefit of the lot-holders under grants from the Pueblo or city of San Francisco, or other competent author-

ity, and as to any residue, in trust for the use and benefit of the inhabitants of the City.'

"The appeal of the city attorney, or, as it has been called 'Notice of Appeal,' is in these words:

"'IN THE DEPARTMENT OF THE INTERIOR,
"'GENERAL LAND OFFICE.

"'The City of San Francisco and its successor, the City and County of San Francisco, *in discharge of its trust for the benefit of the lot-holders* under grants from the Pueblo, town, or city of San Francisco, or other competent authority, and *for the benefits of the inhabitants of the City*, created by the final decree of the Circuit Court of the United States, * * * hereby appeals to the Honorable the Secretary of the Interior from the decision of the Honorable the Commissioner of the Land Office,' etc., approving the Stratton survey. True, the Supervisors passed a resolution characterizing the appeal as unauthorized but they neither dismissed the appeal nor did they withdraw their protest against the survey. On the contrary, they passed the following resolution: 'Resolved, That the Secretary of the Interior, before whom the matter relating to the boundaries of the Pueblo decision which relates to the presidio reservation of San Francisco is now pending, be requested to take up and decide said case without further delay, and that the officials of this City and County be directed not to ask for further postponement of said cause on behalf of said City;' thus recognizing that the case was pending before the Secretary.

"Independently, however, of the regularity of the appeal, I believe Secretary Schurz and Secretary Teller both, so long as the case was undisposed of, had jurisdiction to order a resurvey by virtue of their supervisory authority over the Commissioner of the General Land Office in the matter of surveys of private land claims. The law places the Secretary at the head of the Land Department and makes it his duty to see that the laws of Congress respecting private land claims are carried out, and if knowledge comes to him in any way that the Commissioner has approved of any survey which is not authorized by law, he has authority, whether an appeal be taken or not, to review the action of the Commissioner, and to overrule it if it be erroneous. He cannot allow the Government to be despoiled through what he deems to be a mistake in fact, or error in law, or any remissness on the part of any subordinate under him. I concur in the opinion of Secretary Schurz that the Act of Congress required the survey to follow the decree, and that the City could not, by any act of

its own, either by a formal declaration, or in any other way, change the duty of the Interior Department, or affect the rights of the United States, or of lot-holders claiming under the City. The City did not own the land. She was a trustee of it — a trustee of the title for parties claiming under its conveyance, or occupying lots within its limits; and should not be allowed, being such trustee, to so control the case as to defeat the rights of the *cestuis que trust*. When, therefore, the attorney took the appeal for the benefit of these *cestuis que trust* the municipal authorities of the City could not despoil them by repudiating the appeal."

In the fourth conclusion of law, the Referee finds that the survey of Von Leicht was illegal, because it was not retained in the office of the Surveyor-General for ninety days. Secretary LAMAR meets this objection in his decision as follows:

"It is said that even if the Land Office had properly ordered a resurvey, such resurvey was not made as the law requires. In other words, that the survey made by Von Licht, upon which the patent was issued, was not filed and retained in the Surveyor-General's Office, and notice published, so that parties interested therein might interpose objections thereto. In order that these objections may be fairly weighed I give the section of the law on which it is based in full:

"'*Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled*, That whenever the Surveyor-General of California shall, in compliance with the thirteenth section of an act entitled 'An Act to ascertain and settle the private land claims in the State of California, approved March third, eighteen hundred and fifty-one, have caused any private land claim to be surveyed and a plat to be made thereof, he shall give notice that the same has been done by a publication, once a week for four consecutive weeks, in two newspapers, one published in the City of San Francisco, and one published near the land surveyed; and shall retain in his office, for public inspection, the survey and plat until ninety days from the date of the first publication in San Francisco shall have expired; and if no objections are made to said survey, he shall approve the same and transmit a copy of the survey and plat thereof to the Commissioner of the General Land Office at Washington for his examination and approval; but if objections are made to said survey within the said ninety days by any party claiming to have an interest in the tract embraced

by the survey, or any part thereof, such objection shall be reduced to writing, stating distinctly the interest of the objector, and signed by him or his attorney, and filed with the Surveyor-General, together with such affidavits or other proofs as he may produce in support of the objections. At the expiration of said ninety days the Surveyor-General shall transmit to the Commissioner of the General Land Office at Washington a copy of the survey and plat, and objections, and proofs, filed with him in support of the objections and also any proofs produced by the claimant and filed with him in support of the survey, together with his opinion thereon; and if the survey and plat are approved by the said Commissioner he shall endorse thereon a certificate of his approval. If disapproved by him, or, if, in his opinion, the ends of justice would be subserved thereby, he may require a further report from the Surveyor-General of California touching the matters indicated by him, or proofs to be taken thereon, or may direct a new survey and plat to be made. Whenever the objections are disposed of, or the survey and plat are corrected, or a new survey and plat are made in conformity with his directions, he shall endorse upon the survey and plat adopted his certificate of approval. After the survey and plat have been, as hereinbefore provided, approved by the Commissioner of the General Land Office, it shall be the duty of the said Commissioner to cause a patent to issue to the claimant as soon as practicable after such approval.' (13 Stats., 332.)

"The object of the publication of the notice when the original survey is made is to call attention to it of all parties who may be interested, not only the parties whose land is covered by the survey, but parties having adjoining property which may be affected by it. The careful reading of this section shows that the proceedings therein set forth apply to the original survey. When the original survey is corrected, and a new survey made in accordance with the correction ordered, the law does not require the same proceedings to be gone through as with the original survey. The language of the statute is too plain for cavil: 'Whenever * * * a new survey or plat are 'made in conformity with the directions, he shall endorse upon the 'survey and plat adopted his certificate of approval.' There is no publication of notice required. The law is complied with when the new survey is made in conformity with the directions.

"This is in harmony with the practice and decisions of this Department. In 1879 Mr. Schurz held that the law contemplates the publication of but one survey, and that any subsequent survey of the same claim is not required to be published. In giving his directions to the Commissioner on this subject, he says: 'During the time limited to

such publication all objections to the survey will be presented. If upon the consideration of such objections and the testimony filed in support of them, a new survey is ordered, either by your office or by this Department, the order directing the new survey should point out specifically in what respect the first survey is incorrect, and how the new survey should be made * * * When a survey is made in accordance with such directions and returned to your office for approval, the only question to be considered is *whether the decision directing the survey has been complied with.* If it has, then the survey should be approved; if it has not, then it should be returned for correction, and when corrected, approved. * * * The law contemplates that objections may be raised to the first survey made, and hence gives an opportunity, during the period of publication of ninety days thereafter, to any person affected thereby, to appear and object to the survey; but after the survey is corrected in accordance with your decision, no further publication is provided for, but the law directs that the plat of survey shall be aproved by you, and thereupon a patent shall issue to the claimant as soon as practicable after such approval.'

"This was in full accord with a decision made by the Commissioner of the General Land Office in 1875, in the Rancho Corral del Tierra case. Speaking of the Act in question, Commissioner Burdett says:

"'Here, it will be observed, is no express or implied authority for the publication of a resurvey of a private land claim in California, made after contest, under a decision of this office or of the Honorable Secretary, and there being no other provision of law authorizing such a publication, it follows that none can legally be made by your office in such cases; for your office is of limited jurisdiction, with only the powers conferred by legislative enactment, which cannot legally be exceeded, however disastrous the result.

"'In view of the law and for the reasons above set forth, you are hereby directed not to publish, under the provisions of the Act of July 1, 1864, any resurvey of a private land claim in California made under the decision of this office or of the Honorable Secretary of the Interior, where the publication of a prior survey of the same claim has once been properly made under said Act, and the survey thus published rejected by this office.'

The Referee also thinks the Von Leicht survey illegal because he finds it was not approved by the Surveyor-General—a very remarkable conclusion of law truly;

for, according to this, the United States Surveyor-General would be the final arbiter in the matter of locating land claims, instead of the Secretary of the Interior. The Findings, however, show that the Surveyor-General certified that the survey had been made "in accordance with orders of the Secretary of the "Interior, dated March 3, 1881, and July 12, 1883"—the highest form of certificate, one would imagine; for the Surveyor-General, in the matter of surveying private land claims, is certainly as much subject to the supervision of the Secretary of the Interior as Mr. Secretary LAMAR held the Commissioner of the General Land Office to be.

Perhaps it is just as well to point out that the parol evidence by means of which it is sought to control the patented line is wholly ineffectual for that purpose, even if it were legally admissible. The line of ordinary high water of the Bay of San Francisco, as that line existed on the seventh day of July, 1846, constituted the east boundary of the Pueblo lands, as determined by the decree. This was the line to find, and when found, to locate on the ground. Now, none of the evidence adduced on behalf of defendants in error showed where that line was *on the seventh of July*, 1846, which it should have done in order to overthrow (as is claimed it does) the patented location. The latter specifically determines the line as it existed at the crucial point of time, whereas the evidence against it comes no nearer than eight years after that time. The witness relied on is George Turner (fol.

7 of Transcript of Record), who had no acquaintance with the premises until 1854, when he made at that time surveys in the neighborhood; while the documents relied on by defendants in error outside of the rejected Stratton survey (which, as being a rejected survey, is of no value at all, as held in *Snyder* v. *Sickles*, 98 U. S., 203) do not themselves purport to show where the tide line was on the seventh day of July, 1846. It is perfectly obvious that the patented line, established as of the very point of time required, cannot be held subordinate to evidence as loose as this, when we are relegated, as we are, to one particular point of time, and to none other.

We have noticed these minor matters simply by way of completion of presentation, and not because they can be deemed of any serious consequence. The patent having issued on a survey which the Land Department had jurisdiction to make, that is an end of the case. All matters *intermediate* the survey and patent are, so far as collateral attack on the patent is concerned, inconsequent and immaterial (*Churchill* v. *Anderson*, 56 Cal., 60). As is said by Mr. Justice FIELD, in the opinion delivered by him for the Court in *Doll* v. *Meador*, 16 Cal., 325:

"If a patent is void upon its face, it may be assailed at any time, and in all cases; for it is itself record evidence of the matter which renders it a nullity. If it be issued in the absence of legislation directing a disposition of the property described, or by an officer who is not invested with power to sign the same, or for an estate prohibited, its validity may be controverted in any action, either directly or collaterally; but if the authority to issue the patent *depend upon the existence of particular facts in reference to the condition or location of the*

property, or the performance of certain antecedent acts, and the officers have been appointed for the ascertainment of these matters in advance, who have passed upon them and given their judgment, then the patent, though the judgment of the officers be in fact erroneous, cannot be attacked collaterally by parties showing title subsequently from the same source, much less by those who show no color of title in themselves."

With these pregnant words we close the argument, and ask that the judgment be reversed, with a direction that judgment be entered for plaintiff in error on the findings.

SAMUEL M. WILSON,
EDWARD R. TAYLOR,
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Office Supreme Court U. S.
FILED
OCT 17 1891

No. 824.

IN THE

SUPREME COURT

OF THE

UNITED STATES.

October Term, 1891.

THOMAS KNIGHT,
Plaintiff in Error,

vs.

THE UNITED LAND ASSOCIATION and CLINTON C. TRIPP,
Defendants in Error.

Brief on Behalf of Defendants in Error.

PHILLIP G. GALPIN,
CHAS. N. FOX,
Attorneys for Defendants in Error.

Filed this ..... *day of* ..... *A. D., 1891.*

Clerk.

By ..... *Deputy Clerk.*

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As to the "Statement."

The counsel for plaintiff in error have attempted, at page 2 of their brief, to state "the question involved" in this hearing; but we submit that the statement is not quite accurate.

The real question is not "whether *the State of California*, can, by *its* courts, in an action of ejectment, challenge the correctness of location of a Mexican Grant, as that location is evidenced by United States Patent," etc.; but whether any Court of competent jurisdiction to hear and determine cases in ejectment, and having a case of that class before it for adjudication, wherein there is no question of its jurisdiction over both the parties and the subject matter, can determine whether or not the title to the land for the recovery of which the action is brought passed by the Patent issued "by the political department of the Federal Government in its execution of the treaty of Guadaloupe Hidalgo," etc.

This involves two other questions: (1) whether or not a patent issued by the political or executive department of the Federal Government, in its execution of the treaty of Guadaloupe Hidalgo, which includes within the survey and description given in the patent, the entire Mexican Grant as the same is confirmed, (or so nearly so that the Patentee, after having accepted the patent, will be estopped from denying that it embraces the entire grant), will vest in the Patentee title to lands included within the exterior boundaries of the survey, but not included in the grant as made by the Mexican government, or as confirmed by the Courts of the United States, and of which the Federal

Government had parted with title before the inception of any proceedings for confirmation of the grant, and necessarily, long before the execution of the patent? (2) Whether or not the issue of a patent by the political or executive officers of the Federal Government, under the Act of Congress, of July 1st, 1864, entitled: "An Act to expedite the settlement of the titles to lands in the State of California," or under the Act of March 8th, 1866, entitled: "An Act to quiet the title to certain lands within the corporate limits of the City of San Francisco," can estop an adverse claimant from seeking or receiving the benefit which Congress attempted to secure to him under the provisos attached to and made part of section five of the first named Act, and with which the last named Act concludes?

The term "tide lands" as used by counsel for plaintiff in error, on page 3 of their brief, in stating the basis of the claim of defendant in error, as said term is frequently used, does not properly or fully express the true basis of the claim of said defendant in error. That term is frequently used as describing lands lying between ordinary high water mark and extra ordinary high water mark—those that are made productive of certain kinds of vegetation by reason of occasional overflow. The claim of defendants in error in this case is based on the fact that the lands involved are situate be-

low ordinary high water mark—such as are utterly barren of vegetation, by reason of the regular and daily overflow of the same by tide waters—and that they constitute a part of the sea shore of the bay of San Francisco.

Brief of Argument.

Section five of the Act of 1864 above referred to, reads as follows:

"Section 5. And be it further enacted, that "all the right and title of the United States to "the lands within the corporate limits of the City "of San Francisco, as defined in the Act incorpor "ating said city, passed by the Legislature of the "State of California, on the 15th of April, 1851, "are hereby relinquished and granted to the said "city and its successors, for the uses and purposes "specified in the ordinances of said city, ratified "by an Act of the Legislature of said State, ap- "proved on the 11th day of March, 1854, entitled "'An Act concerning the City of San Francisco, "'and to ratify and confirm certain ordinances of "'the common council of said city,' there being "excepted from this relinquishment and grant, "all sites or other parcels of lands which have "been or now are occupied by the United States "for military, naval, or other public uses, or such "other sites or parcels as may hereafter be desig- "nated by the President of the United States "within one year after the rendition to the Gen-

" eral Land Office by the Surveyor General of an " approved plat of the exterior limits of San Fran- " cisco, as recognized in this Section, in connec- " tion with the lines of the public surveys; *and* " *provided, that the relinquishment and grant by this* " *Act shall in no manner interfere with or prejudice* " *any bona fide claims of others, whether asserted ad-* " *versely under rights derived from Spain, Mexico or* " *the laws of the United States, nor preclude a judicial* " *examination and adjustment thereof.*"

The Act of 1866 referred to, reads as follows:

" *Be it enacted by the Senate and House of Repre-* " *sentatives in Congress assembled*, that all the right " and title of the United States to the land situ- " ated within the corporate limits of the City of " San Francisco, in the State of California, con- " firmed to the City of San Francisco by the de- " cree of the Circuit Court of the United States " for the northern district of California, entered " on the eighteenth day of May, one thousand " eight hundred and sixty-five, be, and the same " are hereby relinquished and granted to the said " City of San Francisco and its successors, and the " claim of said city to said land is hereby con- " firmed, subject, however, to the reservations and " exceptions designated in said decree, and upon " the following trusts, namely, that all said land, " not heretofore granted to said city, shall be dis- " posed of and conveyed by said city to parties in " the bona fide actual possession thereof, by them- " selves or tenants, on the passage of this Act, in " such quantities, and upon such terms and condi-

" tions as the Legislature of the State of California " may prescribe, except such parcels thereof as " may be reserved and set apart by ordinance of " said city for public uses; *provided, however, that* " *the relinquishment and grant by this Act shall not* " *interfere with or prejudice any valid adverse right or* " *claim, if such exist, to said land or any part thereof,* " *whether derived from Spain, Mexico or the United* " *States, or preclude a judicial examination and ad-* " *justment thereof.*"

The first named Act is relied upon as a grant of that which was within the original corporate limits of the city, and the last named as a grant of that which was within the four square leagues mentioned in the decree referred to, and not already covered by the grant contained in the Act of 1864. By the express language of both Acts, the grant is limited to "*all the right and title of the United States*," and by the express language of each proviso, *the bona fide claims of others, whether under Spain, Mexico, or the United States, are not to be prejudiced, nor their right to judicial examination and adjustment thereof precluded.* Congressional intent could hardly be better expressed, nor private rights hardly better protected by Congressional Act. Can the political or executive department of the government defeat this intent, or withdraw this protection? Manifestly not.

An orderly consideration of the "questions involved" in this case would seem, therefore, to re-

quire that a Court called upon to try the case at *nisi* should make "judicial examination" and inquiry as to whether or not the lands for the recovery of which this action is brought were lands embraced within the so called grant to the Pueblo of San Francisco, as the same was found to have existed, and as the same was confirmed, in and by the decree of confirmation of such grant, and if not, whether or not they were lands in which the United States had any "right or title" at the date of the patent, or of either of the Acts of Congress before referred to; and if both these are found in the negative, then an "adjustment" of the rights of defendant requires that the Court should inquire whether or not he had title, under either Spain, Mexico, or the United States.

The *validity* of the patent as such, has not been impeached, and there is no desire to impeach it. There is no question but that it is perfectly valid, and has all the effect of a valid patent, as to all the lands included in the description therein given, which were included in the concession of the Mexican Government, or in the decree of confirmation. As was said by Mr. Justice FIELD, speaking for this Court, in *Beard* vs. *Federy*, (3 Wall, at page 491):

"As a deed, its operation is that of a quit claim, or rather of a conveyance of such interest as the

United States possessed in the land, and it takes effect by relation *at the time when the proceedings were instituted by the filing of the petition before the Board of Land Commissioners.* In the second place, the patent is a record of the action of the Government upon the title of the claimant *as it existed upon the acquisition of the country.*"

As and how it existed upon the acquisition of the country was determined in and by the decree of confirmation, a copy of which is given in full in the transcript of record herein, at folios 23 and 26.

"The patent could only issue on this final decree of confirmation of the Spanish or Mexican grant, and was, in effect, but the execution of that decree."

United States vs. Minor, 114 U. S., 242.

"When a decree gives the boundaries of the tract to which the claim is confirmed with precision, and has become final by stipulation of the United States, and the withdrawal of their appeal therefrom, it is conclusive, not only on the question of title, but also as to the boundaries which *it* specifies. *U. S.* vs. *Halleck*, 1 Wall; 439; *U. S.* vs. *Billing*, 2 Wall, 244; *Higueras* vs. *U. S.*, 5 Wall, 827, and the Act of Congress of July 1, 1864. (13 Stat. U. S. 334, Sec. 7), requires the surveyor general, in making surveys of private land claims confirmed, to follow the decree of confirmation as closely as practicable, whenever such decree designates the specific boundaries of the claim."

United States vs. Hancock, 133 U. S., 196.

If, therefore, a ministerial officer, is executing a decree of confirmation which fixes specific boundaries, his act may be and is perfectly valid, in so far as he includes within his survey the tract bounded and described in and by the decree, but it can not operate to convey lands embraced within his survey but not embraced within the specific boundaries established by the decree, and especially so if the party executing the conveyance has no title to said lands.

In this case a good deal has been said about the necessity of fixing and establishing the specific boundaries named in the decree by actual survey on the ground, for the purpose of ascertaining quantity, and establishing the one remaining boundary which was undetermined by the decree.

In the case of *Railroad Company* vs. *Schurmeir*, (7 Wall., 262), the question was whether the shore line of the Mississippi river was the boundary of the grant, or the meander line which the surveyors had run along the river, and which was given in the patent. The State Court held "that the river, in this case, and not the meander line, is the west boundary of the lot," and in that conclusion this Court entirely concurred. (See p. 286.)

So in *Jones* vs. *Martin*, (13 Sawyer, 317), Mr. Justice Ross, speaking for the Court, says:

"The meander line down the coast was necessary for the purpose of ascertaining the quantity

of land embraced within the survey. But that the ocean, and not the meander line as actually run on the ground, was intended to be the westerly boundary of the rancho is clearly shown by the fact that upon the official plat, made from the field notes, and annexed to and forming a part of them, the meander line is represented as the line of the ocean."

It follows from the reasoning of this case, that if there was in fact a discrepancy between the meander line and the actual line of the ocean on the ground, the latter would prevail, and constitute the boundary of the land conveyed by the grant and patent. So it is claimed here that the line of ordinary high water mark of the bay of San Francisco must prevail as the boundary of the land conveyed by the grant and patent, whenever and wherever there is a discrepancy between that line and the meander line of the survey, for that is the line fixed and established by the decree.

Numerous California cases have been cited by counsel, for the purpose of showing that it has become the established rule of the Supreme Court of that State, that the accuracy of the boundaries given in a patent, cannot be questioned in a collateral proceeding, nor the fact that by the patent title passed to all the lands lying within those boundaries be inquired into. That Court, in this

case has reviewed those decisions, and attempted to show that the present decision is not in conflict with the former ones. Whether it has succeeded or not, or whether there is a conflict between this and former decisions of the same Court, are considerations which may affect the weight to be given to the opinions of that Court when cited as authority, but which cannot affect the action of this Court in the case before it; for the question here, and the only question, is one of the jurisdiction and power of Federal Officers in executing Federal laws, and in the performance of duties devolving upon the Federal Government. It is a case, therefore, in which this Court will not be bound by the decisions or practice of the Courts of *any* State. Wherefore the discussion of those cases here and now must be fruitless, except so far as their reasoning may be persuasive, but not authoritative in this Court.

It does not follow that a patent must be void *in toto*, and so appear upon its face, to justify an attack upon it in a collateral proceeding. It may be, as this one is, perfectly valid, as a conveyance of that which was authorized to be conveyed, and of which the officers making it had power to make conveyance, and upon its face be invalid and void as to other parts, attempting to convey lands of which they had no power to make conveyance; and if so, there is nothing in reason or in law, to pre-

vent its being impeached as to such part, in whatever tribunal it may come.

This patent upon its face shows that it was made in execution of the decree of confirmation recited therein. The jurisdiction and duty of the officers was to make it in conformity with that decree. There was nothing in the Act of Congress to authorize a departure from the terms of that decree, whenever the terms and boundaries given in the decree were specific. On the contary, the Acts of 1864 and of 1866, if themselves treatted as grants, specifically limited the grant as the same was limited in the decree; and section 7 of the Act of 1864, (13 Stat. 333), in express terms required the surveyor "*to follow the decree of confirmation as closely as practicable, whenever such decree designates the specific boundaries of the claim.*" This decree specifically declares that the land of which confirmation is made, (and it is so shown upon the face of the patent, record, f. 25), is located "*above ordinary high-water mark*, (as the same " existed at the date of the conquest of the country " namely, the seventh of July, A. D., 1846)," and that being so situate, the eastern boundary was the Bay of San Francisco. A plat of the survey was annexed to the patent, *and made part thereof*, (f. 28). That plat, so forming a part of the patent, shows upon its face, that along the eastern boundary of the peninsula, there was included within

the survey, and attempted to be conveyed by the patent, certain lands marked upon the plat itself as below the water line, and among them certain lands lying within ship's channel in a navigable arm of the bay. It was claimed that the lot in controversy here was of this class. Oral testimony was offered, and it is now insisted that it was properly admitted, to show just where this lot was located, and thus show whether it *was shown by the patent* to be of this class or not. Being so shown by the patent to be of this class, further evidence was introduced to show not only that it is now, but that it always was, *below ordinary high-water mark*. There was, and is no pretence that the waters of the bay have encroached upon the land since 1846—though the converse of that proposition is true in regard to several important places along the eastern shore of that peninsula and to an extent, if the rule now insisted upon by the plaintiff in error is to be adhered to, which makes this patent put in future and no distant peril, *the great commercial heart of, and more than one fourth of all the present taxable property in* the City of San Francisco.

It thus appearing upon the face of the patent that the officers preparing and executing the same had exceeded the jurisdiction conferred upon them by the laws under which they were acting, and which alone conferred upon them jurisdiction to act,

the patent to the extent of such excess of jurisdiction, was subject to attack, in any Court into which it might come. It has been so held by this Court in numerous instances, to a few of the latest of which we refer.

Smelting Company vs. *Kemp*. (104 U. S., 636), was an action like this in ejectment. It was brought for the recovery of a mining claim, and in it the plaintiff relied upon a patent from the government of the United States, and it was conceded that the land was included within the calls of the patent. There was no question whatever of the title of the Government to the land at the date of the patent. It was a case where the entire proceedings, from the incipiency of the claim, to the issue of patent, including the determination of the validity of the claim, and of its boundaries, was committed to the Land Department of the Government. The patent was not attacked on the ground of want of jurisdiction of the subject matter, on the part of the executive officers of the Government, but solely on the ground of alleged irregularity in the proceedings antecedent to the issue of the patent. Mr. Justice FIELD delivered the opinion of the Court, sustaining the patent, Mr. Justice MILLER and Mr. Justice HARLAN dissenting. The patent was sustained on the ground that the officers of the Land Department were the proper persons, and constituted the proper tribunal

to determine *who* may acquire the lands involved in that case, and the terms of the acquisition; that in so determining they exercised judicial functions, *in matters whereof they had jurisdiction*, and their determination could not be collaterally attacked. But the learned and able Justice concedes that there are limitations to the conclusiveness of presumptions attending a patent for lands, and at page 641 and following, says:

"Of course, when we speak of the conclusive "presumptions attending patent for lands, we "assume that it was issued in a case where the "department had jurisdiction to act and execute "it; that is to say, in a case where the lands be- "longed to the United States, and provision had "been made by law for their sale. If they *never* "*were public property*, or had previously been dis- "posed of, or if Congress had made no provision "for their sale, or had reserved them, *the depart- "ment would have no jurisdiction to transfer them, "and its attempted conveyance of them would be in- "operative and void*, no matter with what seeming "regularity the forms of law may have been ob- "served. The action of the department would in "that event be like that of any other special "tribunal not having jurisdiction of a case which "he had assumed to decide. Matters of this kind "disclosing a want of jurisdiction, may be consid- "ered by a Court of Law. *In such case the objection*

" *to the patent reaches beyond the action of the special* " *tribunal, and goes to the existence of a subject upon* " *which it was competent to act.*"

And the learned Justice adds: " These views are not new in this Court; they have been, either in express terms or in substance, affirmed in repeated instances." He then refers to and discusses at some length, the case of *Polk's Lesse* vs. *Wendell*, reported in 9th Cranch, and in the course of the discussion, quotes the following language of Mr. Chief Justice MARSHALL, in delivering the opinion of the Court: " There are cases in which the " grant is absolutely void; *as where the State has no* " *title to the thing granted, or where the officer had no* " *authority to issue the grant.* In such cases, the " validity of the grant is necessarily examinable " at law." Both these alternatives, rendering the grant void, it is claimed, appear in this case; so far as relates to the land below ordinary high water mark. But of this, more later on. In the same connection, the learned Justice next quotes the following language, from the case of *Patterson* vs. *Winn*, reported in 11th Wheaton:

" We may, therefore, assume as the settled doctrine of this Court, that if a patent is absolutely void upon its face, or the issuing thereof is without authority, or was prohibited by statute, *or the State had no title, it could be impeached collaterally in*

a Court of Law, in an action of ejectment, but in general other objections and defects complained of, must be put in issue in a regular course of pleading in a direct proceeding to avoid the patent."

And immediately following this quotation, Mr. Justice FIELD adds:

"The doctrine declared in these cases as to the presumptions attending a patent has been uniformly followed by this Court. *The exceptions mentioned have also been regarded as sound*, although from the general language used, some of them may require explanation to understand fully their import. If the patent, according to the doctrine, be absolutely void on its face, *it may be collaterally impeached in a Court of Law*. It is seldom, however, that the recitals of a patent will nullify its granting clause, as, for instance, that the land which it purports to convey is reserved from sale. *Of course, should such inconsistency appear, the grant would fail.* Something more, however, than an apparent contradiction in its terms is meant when we speak of a patent being void on its face. It is meant that the patent is seen to be invalid, *either when read in the light of existing law*, or by reason of what the Court must take judicial notice of; as, for instance, that the land is reserved by the statute from sale, or otherwise appropriated, *or that the patent is for an unauthorized amount*, or is

executed by officers who are not intrusted by law with the power to issue grants of portions of the public domain.

"So also, according to the doctrine in the cases cited, if the patent be issued without authority, *it may be collaterally impeached in a Court of Law.*"

And again, commencing near the foot of page 646, the same learned Justice says:

"On the other hand, a patent may be collaterally impeached in *any* action, and its operation as a conveyance defeated, by showing that the department had no jurisdiction to dispose of the lands; that is, that the law did not provide for selling them, or that they had been reserved from sale, or dedicated to special purposes, *or had been previously transferred to others.* In establishing any of these particulars, the judgment of the department upon matters properly before it is not assailed, nor is the regularity of its proceedings called into question; *but its authority to act at all is denied, and shown never to have existed.*"

These conditions, constituting the exceptions to which the Court has thus referred, are exactly the conditions appearing in this case. "*When read by the light of existing law,*" (the Acts of Congress referred to, and the decree of confirmation recited in the patent), it is seen from the face of the

patent, that an attempt is made to convey land lying below "ordinary high-water mark," and therefore, not included in the grant; "that the patent is for an unauthorized amount;" and that it included land "in which the Government had no title in the thing granted," and consequently, that *as to such land, the authority to issue the patent never existed.*

In *Wright* vs. *Roseberry* (121 U. S., 488), the opinion was again delivered by the same eminent jurist, Mr. Justice FIELD, and in it he reiterates the doctrine of *Smelting Company* vs. *Kemp*, in regard to the circumstances under which a patent may be impeached, in a Court of Law, citing the same and other authorities, and making much the same quotations therefrom. There, as here, the action was in ejectment. The lands in controversy were claimed to be swamp and overflowed land, and the plaintiffs claimed under title derived from the State of California; the defendants were in possession, claiming title under patents derived from the United States. The lands had never been listed to the State. Judgment below went for the defendants, and the case was brought here, as in this case, upon writ of error. The opinion is one of great length and erudition—too long to be quoted at length here, but included the quotations already made. The Court held that the Swamp and Overflowed Land Act of September 28th,

1850, was a grant *in presenti*, and vested the title to lands actually swamp and overflowed in the several States where situate, at the date of the passage of the Act; that the neglect or failure of the land department of the Government, upon whom the duty devolved, to make the proper designation and identification thereof as swamp and overflowed, could not operate to defeat the grantees of the State; that on the neglect or failure of the Secretary of the Interior to make such designation, it was competent for the grantees of the State to identify the lands in any other appropriate mode, to prevent their rights from being defeated; *that the issue of patents by the United States for those lands to defendants or their grantors, under the pre-emption laws, upon claims initiated subsequent to the swamp land grant to the State, is not conclusive at law as against parties claiming under such grant, and in an action for their possession, evidence is admissable to determine whether or not the lands were in fact swamp and overflowed at the date of the swamp land grant, and if proved to have been such, the rights of subsequent claimants under other laws are subordinate thereto.*

After reviewing the case and the earlier authorities at great length, Mr. Justice FIELD, speaking for the Court at page 518, says:

"In this case the defendants trace title by patents of the United States purporting to be issued to settlers under the pre-emption laws, in 1866, 1867, 1868 and 1871, upon declaratory statements made in 1864, three years after the purchase from the State by the grantors of the plaintiff, and two years after a map segregating these lands had been made by the *surveyor of the county*, pursuant to the law of the State, and deposited in the Surveyor General's office. These patents were evidence that *whatever title the United States then held passed to the patentees* and *as against a mere intruder* without claim of title from a paramount source, were conclusive that the lands were of the character which by the patents they were represented to be." * * * *. "It is the duty of the Land Department, of which the Secretary is the head, to determine whether land patented to a settler is of the class subject to settlement under the pre-emption laws, and his judgment as to this fact is not open to contestation in an action at law by a mere intruder without title. *But this doctrine has no application where a party, whether plaintiff or defendant, asserts title to premises in controversy from a paramount source, or by a conveyance from a common source.* The doctrine that all presumptions are to be indulged in support of proceedings upon which a patent is issued, and which is not open to collateral attack in an action

of ejectment, *has no application, where it is shown that the land in controversy had, before the initiation of the proceedings upon which the patent was issued, passed from the United States.* The previous transfer is a fact which may be established in an action at law as well as in a suit in equity."

In this case no dissent is announced, and it concludes with a reversal of the judgment of the Courts below.

The case at bar does not seem to differ from *Wright* vs. *Rosebery* in any point material to the question of the right to inqnire into the validity of the patent in an action at law, so far as it affects the lands in controversy, or, *of what ought to be the result of such inquiry*. In this case, it is true, that the subject matter—the material thing—of which the Land Department had power and authority to give patent, was the land embraced in what is commonly, though scarcely correctly, called a Mexican grant. If that grant had been of a fixed quantity, within undefined boundaries containing a larger quantity, it may be conceded that whatever rights the State of California ever acquired within those larger exterior boundaries, either under the law admitting her into the Union, September 9th, 1850, or under the Swamp Land Act of September 28th, 1850, she took in subordination to the Mexican grant, and to the final settlement of the

boundaries thereof. But it was not such a grant. It was a grant of fixed quantity, and within boundaries that were absolutey fixed on three sides thereof. The only boundary not so fixed is one which does not affect the lands in controversy, no matter where it may be finally located. Under the law of the grant itself—the laws of the Mexican Government—no grant was or could be made of lands lying below ordinary high-water mark, as we shall hereafter show. In this respect, this and all Pueblo grants were unlike what is properly termed "Private Land Grants," which were the special object of the protection guaranteed by the treaty of Guadaloupe Hidalgo. So that, outside of the line of ordinary high-water mark, the State would take *in presenti*, and not in subordination to *this* grant, or the final location of the northern, eastern or western boundaries thereof. By the laws of Mexico, these boundaries were fixed before the conquest. The lands below ordinary high-water mark remained and were, at the date of the conquest, the property of the nation, and at the conquest they became *eo instanti* the property of the conquering nation, uncharged with any trust in favor of the grantees of the former government, and held in no sort of subordination to the settlement of claims in their favor. Thus the title stood on the 9th of September, 1850, when California was, by an Act of Congress created a

Sovereign State, and admitted into the Union. By that act, and at that moment, all that constituted sea shore, passed to and became vested in the State.

On the other hand, if it be preferred to call these lands "swamp and overflowed" (as in one sense the records in the proceedings had in the Land Department show that a portion of them were), they were so by reason of the fact that they were below the line of "ordinary high-water mark," and as "swamp and overflowed" land they passed to the State from the United States, "before the initiation of the proceedings upon which this patent was issued," under which the plaintiff in error now claims, and the case comes squarely within the rule of *Wright* vs. *Roseberry*. The plaintiff in error cannot rely upon the grant by the government of Mexico, as the initiation of the proceedings upon which the patent was issued, for the laws of Mexico never authorized such a claim. The decree of confirmation, given upon the face of the patent, so advised all who might seek title under the State. That decree shows upon its face that the proceedings which culminated in the issue of this patent, were not instituted until July 2nd, 1852, more than two and a half years after the lands had passed to the State, under whichever law they may be held to have passed. The decree of confirmation was not entered until May 18, 1864, nearly fifteen years after the lands had

passed to the State, and when made, it assured the State of its title to all the lands below "ordinary high-water mark," by adjudging and determining that the grant was only of lands "above ordinary high-water mark." The government itself withdrew its appeal from that decree, and allowed it to become final, February first, 1867, as also appears upon the face of the patent; thus again affirming the title of the State. More than seventeen years then elapsed before patent issued, during most of which time the proceedings seem to to have been allowed to lie dormant, and during all of which time, the history and the legislation of the country, municipal, state and national, all show that the municipal claimant, the state and the general government, all treated "ordinary high-water mark" as the boundary between the holdings of the municipality and the state respectively. The record shows that in conformity with this decree, a survey and plat of the grant was made and filed August 13, 1868, approved by the surveyor-general as required by law, and after the proper notice had been given, forwarded to the general land office. From that time forward, the City and State acted upon the faith of that survey and that plat, as establishing the line of ordinary high-water mark and the boundary line between their respective holdings. It was not until more than seven years afterwards that the State parted

with her title to the demanded premises. *The city never did make any conveyance of them*, or assert any claim to them, so far as shown by the record. The plaintiff in error argues his case as if he was a claimant under the city, but the only evidence of such a claim is found at folio 15, where he introduces a judgment roll, in the case of *Thomas Knight* vs. *The City and County of San Francisco*, wherein judgment was rendered November 6, 1868, (three months after the approval of this plat,) quieting title of plaintiff to the premises. This *proves nothing, except that the city neither had or claimed title sufficient to defeat a mere naked intruder*. If his judgment had ran against the State, it might have counted for something; but a judgment quieting title against one who makes no claim, is hardly sufficient to defeat a valid title traced directly from the paramount source of all titles.

The title now claimed by these defendants in error, having "passed from the United States, before the initiation of the proceedings upon which the patent was issued," we submit, on authority of *Wright* vs. *Roseberry*, that the doctrine that the "patent is not open to collateral attack in an action of ejectment, has no application" here.

But *Wright* vs. *Roseberry* does not stand alone. In the late case of *Irwin* vs. *San Francisco Savings Union* (10 Supreme Ct., Rep. 1064); *Wright* vs.

Rosberry was affirmed in all its parts, and it was again held that section one of the Act of September 28, 1850, was a grant *in presenti*, and that, in ejectment suit for lands in California, plaintiff may introduce a patent from the State as evidence that the lands are swamp lands although they have not been patented or listed to the State by the United States.

The still later case of *Tubbs* vs. *Wilhoit, et als.* (11 Supreme Ct., Rep. 279), is also a swamp land case. The plaintiff in the Court below, and in error here, asserts title to the premises under patent of the United States, issued to him in due form on October 18, 1879, upon a homestead entry made by him in May, 1873, and commuted to cash entry in November following. The original defendant below, one Joseph Kile, who afterwards died and in his place his executors Wilhoit and Thompson were substituted, claimed the premises under a patent of the State of California, bearing date the 5th day of August, 1865, conveying the premises to him as swamp and overflowed lands, as a part of the land granted under the act of Congress of September 28, 1850. The question presented was the validity of the title under the patent of California. The opinion was rendered by Mr. Justice FIELD, speaking for the Court without dissent, and the doctrine of *Wright* vs. *Rosberry*, was fully upheld in all its parts, and concludes (so far as relates

to this branch of the discussion) with this language: "A strange thing it would be if the refu-
" sal of an officer of the government to discharge
" a ministerial duty could defeat a title granted
" by an Act of Congress, and would enable him to
" transfer it to parties not within the contempla-
" tion of the Government." The judgment of the Court below in favor of the defendants was affirmed, the patent from the United States being held to have been issued without jurisdiction and therefore void.

The next case from this Court, which seems to have been considered by the Court below, and which seems to have been the latest case called to the attention of that Court, is that of *Doolan* vs. *Carr* (125 U. S. 618). The decision in that case so completely covers the question involved here, of the right, in an action of ejectment, to impeach the validity of a patent granted by the Government of the United States, to the extent that the same may include lands of which the executive officer had no power to make a grant, that, at the risk of extending this brief beyond the ordinary limit, we quote the decision in full. The opinion was rendered by Mr. Justice MILLER, speaking for the Court, Mr. Chief Justice WAITE alone dissenting, and reads as follows:

"William B. Carr, the defendant in error, brought his action of ejectment in the Circuit Court of the

United States for the District of California, against James Doolan and James McCue, to recover possession of 320 acres of land, described as "the east half of section 27, township 2, range 1 east of the Mount Diablo base and meridian, of the public land surveys of the United States of America, in the State of California," and he has judgment for the land. No citzenship of either party is alleged, and this is urged as a ground of reversal in this Court, to which this case has been brought by a writ of error. It, however, appears very clearly that the controversy turns upon the validity of the patent from the United States under which plaintiff claims title, and which was denied by the defendants. The Circuit Court for the District of California, therefore, had jurisdiction of the case as one arising under the constitution and laws of the United States within the meaning of the act of March 3, 1875, (18 U. S. St. at large, 470.)

"On the trial before the jury, the plaintiff introduced in evidence a patent from the United States to the Central Pacific Railroad Company, for the land in question, among many other tracts, dated February 28, 1874. This patent purported to be issued under the Act of Congress, approved July 1, 1862, as amended by the Act of July 2, 1864, to aid in the construction of a railroad and telegraph line from the Missouri river to the Pacific ocean, and to secure to the Government the use of the same for postal, military, and other purposes, and the Act of March 3, 1865, and in accordance with the laws of the State of California, by which the Central Pacific Railroad Company and the West-

ern Pacific Railroad Company were consolidated. Although the introduction of this patent was objected to by the defendants, it appears upon its face to be valid, and it was therefore properly admitted as evidence. The plaintiff also introduced a deed of conveyance from the Central Pacific Railroad Company to himself, and, after further evidence as to the use and occupation of the land, its value, and that the amount in controversy was over $10,000, rested. The defendants thereupon, in order to show that the patent to the railroad company was issued without authority of law, and therefore void, offered evidence to show "that on to-wit, April 10, A. D. 1839, the Mexican government granted to Jose Noriega and Robert Livermore a certain tract of land known by the name 'Las Pocitas,' and which embraced all the land within the following boundaries, viz.: Bounded on the north by the Lomas de las Cuevas, on the east by the Sierra de Buenos Ayres, on the south by the dividing line of the establishment of San Jose, and on the west by the *rancho* of Don Jose Dolores Pacheco, containing in all two square leagues, provided that quantity be contained within the said boundaries; and, if less than that quantity be found to be contained therein, then that less quantity, and all of said described tract of land. That the departmental assembly of the Mexican nation confirm said grant to said Noriega and Livermore on, to-wit: May 22, 1840. That on, to-wit: February 27, 1852, said Noriega and Livermore petitioned the Board of Land Commissioners appointed under the provisions of the Act of Con-

gress, approved March 3, 1851, entitled 'An Act to ascertain and settle the private land claims in the State of California, to have said grant confirmed; and on, to-wit: the 14th day of February, A. D. 1854, the said Board of Land Commissioners confirmed the same to said Noriega and Livermore, their heirs and assigns; and the decree of confirmation, so made to said Mexican grant, by said Board of Land Commissioners, described the boundaries thereof to be: On the north by the Lomas de las Cuevas, on the east by the Sierra de Buenos Ayres, on the south by the dividing line of the establishment of San Jose, and on the west by the *rancho* of Don Jose Dolores Pacheco, provided that within the same no greater quantity than two square leagues were found to be contained; and, if a less quantity should be found therein, then that less quantity was confirmed, and all of said described tract of land. That the United States District Court for the Northern district of California, on appeal to it from said decree of the Board of Land Commissioners, duly confirmed said Mexican grant on, to-wit: February 18, A. D. 1859, to the same extent, and by the same description, and under the same conditions, as said Board of Land Commissioners had done; and the Supreme Court of the United States, at the December term, A. D. 1860, affirmed the said decree of said United States District Court, and every part thereof. That during the year 1865, an official survey of the lands so confirmed to said Noriega and Livermore was made by or under the directions of the Surveyor-general of the United States for the

State of California, and which was duly approved by said Surveyor-general in the year A. D. 1866, and which survey included the half section of land described in the complaint herein. That said survey was set aside by the Secretary of the Interior in the year A. D. 1868, and a new survey ordered to be made of said Mexican grant, within the boundaries set forth in said decrees, which should contain but two square leagues of land, or thereabouts. That in March, 1869, the United States Surveyor-general for California caused the said Mexican grant to be surveyed and designated in accordance with the claims thereof, and within the boundaries set forth in said decrees of confirmation, the amount so segregated consisting of about two square leagues, in accordance with the said order of the Secretary of the Interior; and said survey was approved by said Surveyor General on, to wit: May 11, 1870; and the said survey was approved by the Commissioner of the General Land Office on, to wit: March 1, 1871; and said survey was finally approved by the Secretary of the Interior on, to-wit: June 6, 1871, and on said last named date the surplus (or *sobrante*) of the land embraced within the boundaries contained in said grant and in said decrees became freed and discharged from the claims and reservation of said Mexican grant, and became public land of the United States, and a part of the public domain thereof. That the entire half section of land described in the complaint herein is located and embraced within the boundaries stated and tract described in and confirmed by the said decree of the Board of Land

Commissioners of the United States District Court and of the Supreme Court of the United States; but it was not included within the tract so surveyed in March, 1869, and finally approved on June 6, A. D. 1871, as aforesaid, as the final survey of said Mexican grant, and said half section of land described in the complaint herein was held and claimed as a part and parcel of said Mexican grant, and was reserved as such continually from the 10th day of April, A. D. 1839, down to the 6th day of June, A. D. 1871, and on said last-named day it became for the first time public land of the United States. That the line of the road of said Western Pacific Railroad Company of California was definitely fixed, under the provisions of said Act of Congress, on. to-wit, the 30th day of January, 1865, under and within the intent and meaning of the provisions of the Act of Congress of July 1, 1862, entitled 'An Act to aid in the construction of a railroad and telegraph line from the Missouri river to the Pacific ocean,' and the Act amendatory thereof and supplemental thereto; and that on the 31st day of January, 1865, the lands within the limits designated by said Acts of Congress as being granted to said railroad company were withdrawn from pre-emption, private entry and sale under the provisions of said Acts, and that no part of the lands described in the complaint has been taken or used for any depot, shop, switch, turn-out, or road-bed of said railroad or of said railroad company. That said railroad was completed prior to the year 1870. The plaintiff objected to the proof thus offered to be made by

defendants, and to other proof not material to the point now under consideration, on the ground that the United States patent cannot be collaterally attacked in this action; that it can be attacked by bill in equity only; that the said United States patent, and the recitals therein contained, are conclusive evidence in this action that the legal title of the lands therein described was granted and transferred by the United States to the grantee named in said patent, and taken in connection with the deed from the railroad company to the plaintiff, is conclusive evidence of the plaintiff's right to recover. The Court sustained the objection, and refused to allow said proof, or any part of it, to be made, to which the defendants excepted. The Court then charged the jury that the patent title to this land to the Central Pacific Railroad Company is conclusive in this case. It cannot be attacked in a collateral manner. If it can be attacked at all, it is only by a direct proceeding for the purpose of vacating the patent: and, without further remark upon this, one way or the other, it may be sufficient to say that I charge you the law is that, so far as this case is concerned, the patent from the Government to the railroad company—the first patent introduced here—is conclusive of the rights of the parties in this case. To this charge the defendants excepted, and the case before us turns upon the correctness of the ruling of the Court on the proposition that in this action at law none of the evidence offered by the defendants could be received to impeach the validity of the patent,

and that such an issue as that attempted to be raised by the defendants could only be made by a suit in equity to set it aside.

"There is no question as to the principle that where the officers of the government have issued a patent in due form of law, which on its face is sufficient to convey the title to the land described in it, such patent is to be treated as valid in actions of law, as distinguished from suits in equity, *subject, however, at all times to the inquiry whether such officers had the lawful authority to make a conveyance of the title.* But if those officers acted without authority, *if the land which they purported to convey had never been within their control, or had been withdrawn from that control at the time they undertook to exercise such authority, then their act was void*—void for want of power in them to act on the subject matter of the patent—not merely voidable; in which latter case, if the circumstances justified such a decree, a direct proceeding, with proper averments and evidence, would be required to establish that it was voidable, and should therefore be avoided. The distinction is a manifest one, although the circumstances that enter into it are not always easily defined. It is, nevertheless, a clear distinction, established by law; and it has been often asserted in this Court that even a patent from the government of the United States, issued with all the forms of law, may be shown to be void by extrinsic evidence, if it be such evidence as by its nature is capable of *showing a want of authority for its issue.* The decisions of this Court on this subject are

so full and decisive that a reference to a few of them is all that is necessary. *Polk's Lessee* vs. *Wendal*, 9 Cranch., 87; *New Orleans* vs. *U. S.*, 10 Pet., 730; *Wilcox* vs. *Jackson*, 13 Pet., 509; *Stoddard* vs. *Chambers*, 2 How., 317; *Easton* vs. *Salisbury*, 21 How., 428; *Reichart* vs. *Felps*, 6 Wall, 160; *Best* vs. *Polk*, 18 Wall., 117; *Railroad Co.* vs. *U. S.*, 92 U. S., 733; *Newhall* vs. *Sanger*, Id., 761; *Sherman* vs. *Buick*, 93 U. S., 209; *Smelting Co.* vs. *Kemp*, 104 U. S., 636; *Steel* vs. *Smelting Co.* 106 U. S., 447; 1 Sup. Ct. Rep., 389; *Railway Co.* vs. *Dunmeyer*, 113 U. S. 642, 5 Sup. Ct. Rep., 566; *Reynolds* vs. *Mining Co.*, 116 U. S., 689, 6 Supreme Court Rep. 601. The case of Polk's *Lessee* vs. *Wendal*, is, perhaps, the earliest one in this Court where this subject received full consideration. That was an action of ejectment in the Circuit Court of the United States for the western district of Tennessee. On the trial the plaintiff, who was also the plaintiff in error, introduced and relied upon a patent from the State of North Carolina, of the date of April 17, 1800, which includes the land in controversy. The defendant then offered in evidence a patent issued by the same State, dated August 28, 1795, which also includes the land in dispute. The reading of this prior patent was objected to, but the objection being overruled, the patent was read in evidence. Testimony was then offered to impeach it; and it is upon this branch of the subject that the opinion of the Court, delivered by Chief Justice MARSHALL, is pertinent. After considering the many guards which the statute provide to se-

cure the regularity of grants, and the incipient rights of individuals, as well as to protect the State from imposition, he expresses the view, in language the substance of which has been often since repeated, that, in general, a Court of Equity appears to be a tribunal better adapted to the object of examining into objections to a patent which affects its validity than a Court of Law. He then says: 'In general, a Court of Equity is the more eligible tribunal for these questions; and they ought to be excluded from a court of law. But there are cases in which a grant is absolutely void; as where the State *has no title to the thing granted, or where the officer had no authority to issue the grant. In such cases the validity of the grant is necessarily examinable at law.* In that case the court held that it could be shown, as a defense to the patent, that the entries on which it was granted were never made, and that the warrants were forgeries; in which case no right accrued under the Act of 1777, and, no purchase of the land having been made from the state, the grant was void by the express words of the law, and that in rejecting the testimony on this point the circuit court erred. The judgment was therefore reversed. This case of *Wilcox* v. *Jackson* was an action of ejectment brought against Wilcox, the commanding officer at Fort Dearborn, to recover possession of land held by him in that character. This land was entered under a pre-emption claim by one Beaubean, who paid the purchase-money, and procured the register's receipt therefor. He afterwards sold and conveyed his interest to the

lessor of the plaintiff. The question was whether the register's certificate, which seems to have been treated as sufficient evidence of title if it was valid, could be impeached by testimony that the land was not subject to entry. In the opinion of the Supreme Court on this subject the language used in *Elliott* v. *Peirsol*, 1 Pet. 340, is quoted with approval: Where a court has jurisdiction it has a right to decide every question which occurs in the cause; and, whether its decision be correct or otherwise, its judgment, until reversed, is regarded as binding in every other court. But, if it act without authority, its judgments and orders are regarded as nullities. They are not voidable, but simply void. The Court then proceeds: Now, to apply this. Even assuming that the decision of the register and receiver, in the absence of frauds, would be conclusive as to the facts of the applicant then being in possession, and his cultivation during the preceding year, because these questions are directly submitted to them, yet, if they undertake to grant pre-emptions in land in which the law declares that they shall not be granted, then they are acting upon a subject matter clearly not within their jurisdiction, as much so as if a court whose jurisdiction was declared not to extend beyond a given sum should attempt to take cognizance of a case beyond that sum. In *Stoddard* v. *Chambers*, which was an action of ejectment, an attempt was made to show that the defendant's patent was void. This Court said in that case: The location of Coontz was made in 1818, and his survey in 1818. At these dates there can be

no question that all land claimed under a French or Spanish title, which claim had been filed with the recorder of land titles, as the plaintiff's claim had been, were reserved from sale by the Acts of Congress above stated. This reservation was continued up to the 26th of May, 1829, when it ceased, until it was revived by the Act of 9th July, 1832, and was continued until the final confirmation of the plaintiff's title by the Act of 1836. The defendant's patent was issued the 16th of July, 1832. So that it appears that, when the defendant's claim was entered, surveyed, and patented, the land covered by it, so far as the location interferes with the plaintiff's survey, was not a part of the public land authorized to be sold. On the above facts the important question arises whether the defendant's title is not void. *That this is a question as well examinable at law as in chauncery will not be controverted.* That the elder legal title must prevail in the action of ejectment is undoubted. But the inquiry here is whether the defendant has any title as against the plaintiff's, and there seems to be no difficulty in answering the question that he has not. His location was made on lands not liable to be thus appropriated, but expressly reserved; and this was the case when his patent was issued. * * * *No title can be held valid which has been acquired against law, and such is the character of the defendant's title so far as it trenches on the plaintiff's.* * * * The issuing of a patent is a ministerial act, which must be performed according to law. A patent is utterly void and inoperative which is issued for land that had been

previously patented to another individual. * *

* The patent of the defendant, having been for land reserved from such appropriation is void, and also the survey of Coontz, so far as either conflicts with the plaintiff's title. These principles were recognized in and governed the decision of the Court in *Easton* v. *Salisbury*. In *Reichert* v. *Felps*, which was an action of ejectment, the plaintiff claimed under two patents, of the dates of 1838 and 1853, which the Court says exhibit conclusive evidence of title if the land had not been previously granted, reserved, or appropriated. This was permitted to be proved by the patent of Governor St. Clair, dated February 12, 1799, duly registered in 1804, with a survey made in 1798. This was held to be conclusive evidence that the land was so reserved, and defeated the patents of 1838 and 1853. In *Best* v. *Polk* the plaintiff, in support of his title in an action of ejectment, produced a patent from the United States dated March 13, 1847, which seemed in all respects to be regular, granting the section of land described to James Brown in fee, who conveyed to Polk. The defendant, Best, being in possession, attempted to defeat this patent by showing that the land in question was reserved under the treaties of 1832 and 1834 with the Chickasaw Nation of Indians, which authorized members of the tribe who desired to do so, and heads of families, to locate lands, which, when so located, were to be reserved from sale or other disposition by the United States. The defendant undertook to show that the land on which he was settled, which was the subject

of controversy, had been properly located by an Indian, and was therefore not liable to sale at the time that Brown purchased it of the land officers. The Court below rejected the evidence because of certain deficiencies in the certificate made by one Edmonson, a register of the land office at Pontotoc, who certified that the land in question was located as a reserve by a Chickasaw Indian, under the treaty, in July, 1839. This Court reversed the judgment rendered in favor of plaintiff in the Court below, holding that the certificate was sufficient, and that it showed that under the treaty, and by the action of the Indian in settling upon it, and procuring a certificate of that fact, from the proper officer, the land had become reserved in the language of the treaty, and that the patent under which the plaintiff claimed was therefore void; citing, also, *Polk's Lessee* v. *Wendal*, and *Bagnell* v. *Broderick*, 13 Pet., 436. In the case of *Reynolds* v. *Mining Co.*, 116 U. S. 687, 6 Sup. Ct. Rep. 601, (decided last year,) which was an action to recover possession of part of a vein or lode of mineral deposit, plaintiff relied on a patent for a *placer* mine, and the contested vein was within the lines of its superficial area extended perpendicularly. The statute on which this patent was issued, declared that it should not confer any right to veins known to exist within it at the time the grant was made. Defendants offered evidence to show that the vein in controversy was known to the patentee to exist at the time of his application for the patent. The Circuit Court charged the jury that, because the defendants had shown no right

whatever to the vein, but were in possession as naked trespassers, they could not, in defense of that possession, show this defect in plaintiff's title; but this Court (the Chief Justice dissenting) held that this ruling was erroneous, and that, as in all other actions of ejectment, plaintiff must recover on the strength of his own title, and not on the weakness of defendants'.

"With the principles so well established by these decisions, of the right in an action at law to prove by competent extrinsic evidence that a patent of the United States is void for want of power in the officers to issue it, and the facts which show that want of power, we come to the case of *Newhall* vs. *Sanger*, which establishes the position that land covered by a Mexican claim was not public land within the meaning of the Act of Congress making the grant to the railroad, but was reserved from the granting clause of those statutes. In *Railroad Co.* vs. *U. S.*, decided at the same time with *Newhall* vs. *Sanger*, the opinions in both cases being delivered by Mr. Justice DAVIS, the question of the right to show this want of authority was also very fully discussed. That was a case in which the railroad company had brought suit in equity to establish its title to tracts of land lying within the Osage County, in Kansas, which had been certified to the governor of that State, as part of the grant made by Congress to aid in the construction of certain railroads. This was done by the supposed authority of the Act of March 3, 1863, (12 U. S. St. at Large, 772), granting every alternate section of land in the State of Kansas, desig-

nated by odd numbers, for 10 sections in width, on each side of said road, and of each of its branches. It also contained the usual reservation that in case it should appear, when the line or route of said railroad and branches was definitely fixed, that the United States had sold any of the land granted, or that the right of pre-emption or homestead settlement had attached to the same, then the right was given to select other lands; and it provided that any and all lands theretofore reserved to the United States by the Acts of Congress, or in any other manner by competent authority, for the purpose of aiding in any object of internal improvement, or for any other purpose whatever, 'be, and the same are hereby, reserved to the United States from the operation of the Act.' The route of the road in that case was located through lands which had belonged to the Osage Indians, and to which their title was not extinguished until September 29, 1865. This Court held that, notwithstanding the generality of the granting clause, it was not intended by that statute to grant anything but public lands of the United States at the date of the grant, and that the reservation clause was sufficient to except these lands, then in the possession of the Indians, out of the grant, even if the general language could be construed to include them. The Court says: 'A special exception of this land was not necessary in these grants, because the policy which dictated them confined them to land which Congress could rightfully bestow, without disturbing existing relations and producing vexatious conflicts. The legislation

which reserved it for any purpose excluded it from disposal as the public lands are usually disposed of." In the case of *Newhall* vs. *Sanger*, the object of the suit was to determine the ownership of a quarter Section of land in California. The patent under which the appellee claimed was issued in 1870, under the Act of 1862, granting lands to railroad companies for the purpose of constructing a railroad to the Pacific Ocean. 12 U. S. St. at Large, 492. One of the companies was the Western Pacific Railroad Company, to which was granted every alternate section of public land, designated by odd numbers, within 10 miles on each side of its road, not sold, reserved, or otherwise disposed of by the United States, and to which a homestead or pre-emption claim may not have attached at the time the line of the road was definitely fixed. The Act also declared, as in other cases, that it should not defeat or impair any pre-emption homestead, swamp-land, or other lawful claim, nor include any Government reservation or mineral lands, or the improvements of any *bona fide* settler. The appellant asserted title under a patent from the United States of later date, which recited that the land was within the exterior limits of a Mexican grant called 'Moquelamos,' and that a patent had, by mistake, been issued to the company. It was conceded that the land in controversy fell within the limits of the railroad grant as enlarged by the amendatory Act of 1864 (13 St., 358), the same Act now under consideration; 'and the question arises,' said the Court, 'whether lands within the boundaries of an alleged Mexican

or Spanish grant, which was then *sub judice*, are public within the meaning of the Acts of Congress under which the patent whereon the appellee's title rests was issued to the railroad company.

It will be seen that this is the precise question presented in the case under consideration, and the Court, referring to the preceding case of *Railroad Co.* v. *U. S.*, and reciting the fact that in that case they confined a grant of every alternate section of "land" to such where to the complete title was absolutely vested in the United States; proceeds: The Acts which govern this case are more explicit, and leave less room for construction. The words 'public lands' are habitually used in our legislation to describe such as are subject to sale or other disposal under general laws. That they were so employed in this instance is evident from the fact that to them alone could the order withdrawing lands from pre-emption, private entry, and sale apply. The Court then goes on to show that the status of lands included in a Spanish or Mexican claim pending before tribunals charged with the duty of adjudicating it was such that the right of private property could not be impaired by a change of sovereignty, and that such lands were not included in the phrase "public lands" of these specific railroad grants, and that until such claims were finally decided to be invalid, they were not restored to the body of public lands subject to be granted. Those Mexican claims were often described, or attempted to be described, by specific boundaries. They were often claims for a definite quantity of land within much larger outboundaries,

and they were frequently described by the name of a place or ranch. To the extent of the claim when the grant was for land with specific boundaries, or known by a particular name, and to the extent of the quantity claimed within outboundaries containing a greater area, they are excluded from the grant to the railroad company. Indeed, this exclusion did not depend upon the validity of the claim asserted, or its final establishment, but upon the fact that there existed a claim of a right under a grant by the Mexican Government, which was yet undetermined, and to which, therefore, the phrase "public lands" could not attach, and which the statute did not include, although it might be found within the limits prescribed on each side of the road when located.

"It is objected that the testimony offered in the present case, and rejected by the Court below, to prove the facts concerning the Mexican grant which would defeat the patent to the railroad company, is parol; and that, even conceding the right to assail the patent in an action at law founded on the title conveyed by it, this cannot be done by parol testimony. But, without deciding in this case how far such testimony can be received in an action at law for that purpose, it is sufficient to say that the evidence rejected by the Court below in the present case is entirely documentary, and matter of record, being the written evidence of the grant by the Mexican Government, of its confirmation by the Land Commissioner of California, of the affirmance of the award of that commission by the District Court of the United States, and by

this Court, and of the record of the two surveyors made by the surveyor of the United States, the latter confirmed by the Commissioners of the General Land Office, showing the location and confirmation of the Mexican Grant, and the dates at which all those transactions occurred. We do not doubt that this evidence was admissable for the purpose for which it was offered; and if any oral testimony were necessary to identify the land in controversy as coming within the Mexican grant, and the surveys of the land office, under the decisions of the Courts, we do not think it would be admissible, although it is not clear that any such was necessary or was offered.

"For the radical error of the Court in rejecting this evidence and in the instructions given to the jury on the same point, the judgment is reversed, and the case remanded to the Circuit Court for a new trial."

We have found no case in this or any of the Federal Courts, either among those which have been cited by counsel for plaintiff in error or elsewhere, *where the question was involved*, in which it has not been held as in *United States* vs. *Minor* (*supra*), "*when a decree gives the boundaries of a* " *tract to which the claim is confirmed with precision,* " *and has become final, it is conclusive not only* " *on the question of title, but also as to the boundaries* " *which it specified*"; nor any in which it has not been held that if the executive officers of the Government, in preparing and issuing a patent,

have included within the description given in the survey copied into the patent, lands which did not at the time belong to the Government, or of which they had no jurisdiction to make a grant, the patent was ineffectual for the purpose of conveying such lands, and the fact might be inquired into in an action of ejectment.

Manning vs. *San Jacinto Tin Co.* (7 Sawyer, 427) is not such a case. In that case the grant had been finally confirmed, but the boundaries thereof had never been established by the Mexican Government, and were not specifically defined in the decree of confirmation. There was no pretense that the patent included any land which the executive officers had no power to grant, or that there was any violation of the terms of the decree of confirmation by way of departure from specific boundaries fixed by such decree—for none such had been fixed. The same may also be said of *Ballance* vs. *Forsyth* (13 How. 18) cited by counsel.

In *West* vs. *Cochran* (17 How. 403) the question was whether the plaintiff having received and accepted a patent for lands granted to him by the former Governor of Upper Louisiana, could afterwards, and in that suit, claim land under said grant elsewhere than that described in his patent; in other words, whether he could abandon the

lands surveyed for him and granted by patent, and go further north and recover land there which had never been surveyed in conformity to the concession. The Court held, as we believe it has always held in like cases, that the confirmation of the claim being "unlocated and vague, power was reserved to the 'United States to locate the tract by survey'" and that the same having been located and patent issued and accepted, the patentee and his successor in interest were bound thereby, and had no title to the lands outside the description given in that patent, upon which they could support an action of ejectment. The very citation which the counsel have made from this decision shows upon its face that it was an unlocated claim which had thus been surveyed, and the boundaries thereof fixed, by the Executive officers of the Government after confirmation of the grant.

The case of *Stanford* vs. *Taylor* (18 How. 412) also shows upon its face that the claim had no certain limits, and the confirmation carried along with it the condition that the land should be surveyed and segregated from *the public domain* and the lands of others; and held that in such a case the survey was conclusive.

Willott vs. *Sanford* (19 How. 80) was a case where there were two conflicting confirmations of grant, each confirmation being made by Act of

Congress and founded on surveys previously made, which surveys were subsequently found to overlap. The Court held that the elder confirmation (which was founded on the elder survey) must prevail.

The quotation made by counsel for the plaintiff in error from *Beard* vs. *Federy*, (3 Wall., 478), taken by itself, would seem to have some bearing on this case; but reading the whole case, as the same is reported in the volume cited, it will be seen that it has no relation to, and furnishes no authority for the position taken by the counsel in this case. In that case the plaintiff below, (defendant in error) deraigned title under Bishop Alemany, who held under patent issued by the United States under a decree of confirmation of claim to about nineteen acres of land at Mission San Jose. The claim had been made under the laws of Spain and Mexico in relation to Mission lands, and actual possession, consecration and dedication to religious uses for more than half a century before the conquest—confirmation of claim by the Commissioners, and by the District Court, appeal by the Government dismissed and decree made final, followed by patent. The defendant, (plaintiff in error), claimed under an alleged grant made by Pio Pico, Governor of California, on the 20th of June 1846—seventeen days days before the date of the conquest. The grant recited on its face that the Gov-

ernor had been authorized previously, by the Departmental Assembly, "to alienate the Missions, with the end of preventing their total ruin, and providing the government with the resources which it then immediately for its exigencies required." It was conceded that the claim had never been presented to the Land Commission, nor to any other department of the Government, for confirmation, nor any claim founded upon it. And no record of the grant was ever found among the archives of the Mexican Government. Mr. Justice FIELD, speaking for the Court, after disposing of a technical point which had been made on the language used in the decree of confirmation, and stating another which was based upon the ground that the claim of the Bishop was invalid because it did not rest upon, or was not sustained by, any direct grant or concession in writing, proceeded to dispose of the case as follows.

"The petition sets forth two sources of title, one founded on the laws of Spain and Mexico, and the other on continued possession of the property for a period exceeding half a century. It avers that, at the time of the conquest and cession of California to the United States, the canon law of the Roman Catholic Church was in force as the law of Mexico, as it had been previously of Spain when Mexico was a dependency thereof, in all things relating to the acquisition, transmission, use and disposition of property, real and personal,

belonging to the church, or devoted to religious uses; that by the laws of Spain and Mexico, it was not necessary that a grant of land for ecclesiastical or church purposes should appear by deed or writing, public or private, but that the right of the church to such property was always recognized as regulated by the canon law; that the premises in question, being church lands at the mission of San Jose, consisting of the church, churchyard, burial-ground, orchard and vineyard, with the necessary buildings and appurtenances, the whole embracing a little over nineteen acres of land, had for a long period been devoted to religious purposes and uses; that, by the canon law and the laws of Spain and Mexico, the title, control and administration of all ecclesiastical and church property was vested in the bishop and clergy of the diocese, who, for such purposes, were regarded as a body corporate; and that the Catholic Church, at the date of the conquest and cession of California to the United States, had been in the actual and undisturbed possession of the premises in question since the year 1797.

"These averments clearly present a case within the jurisdiction of the Board of Commissioners. They show 'a claim by virtue of a right or title derived from the Spanish or Mexican Government,' which is all that is required by the Act of 1851. That Act does not define the character of the right or title, or prescribe the kind of evidence by which it shall be established. It is sufficient that the right or title is derived from the Spanish or Mexican Government, and it may in some instances

rest in the general law of the land, as is the case usually with the title of municipal bodies, under the Spanish and Mexican systems, to their common lands.

"The Board having acquired jurisdiction, the validity of the claim presented, and whether it was entitled to confirmation, were matters for it to determine, and its decision, however erroneous, cannot be collaterally assailed on the ground that it was rendered upon insufficient evidence. The rule which applies to the judgments of other inferior tribunals applies here—that when it has once acquired jurisdiction, its subsequent proceedings cannot be collaterally questioned for mere error or irregularity.

"The grant of Pio Pico, bearing date on the 20th of June, 1846, under which the defendants below claimed title to the greater part of the premises in controversy, was rightly excluded. With the offer of the grant the defendants admitted that it had never been presented to the Board of Land Commissioners for confirmation, and had never been confirmed. The Court treated the grant as one in colonization. All such grants, it is a matter of common knowledge with the profession in California, were made subject to the approval of the Departmental Assembly. Until such approval they were not definitely valid; and no such approval was obtained of the grant in question previous to the 7th of July following, when the jurisdiction of the Mexican authorities was displaced, and the country passed under

the Government of the United States. It remained for the new Government succeeding to the obligations of the former Government to complete what thus remained imperfect. By the Act of March 3d, 1851, the Government has declared the conditions under which it will discharge its political obligations to Mexican grantees. It has there required all claims to lands to be presented within two years from its date, and declared in effect that if, upon such presentation, they are found by the tribunal created for their consideration, and by the Courts on appeal, to be valid, it will recognize and confirm them, and take such action as will result in rendering them perfect titles. But it has also declared in effect, by the same Act, that if the claims be not thus presented within the period designated, it will not recognize nor confirm them, nor take any action for their protection, but that the claims will be considered and treated as abandoned. It is not necessary to express any opinion of the validity of this legislation in respect to perfect titles acquired under the former Government. Such legislation is not subject to any constitutionl objection so far as it applies to grants of an imperfect character, which require further action of the political department to render them perfect.

"The Circuit Court, as already stated, treated the grant as one in colonization. This was the most favorable view of the defendants, for if the recitals that it was made upon a sale of Mission lands, and upon authority conferred by the Departmental Assembly, are to determine its character, it is without any efficacy in passing the title. It

is simply a void instrument, and falls directly within the decision of this Court in the *United States* vs. *Workman*. In that case the powers of the Departmental Assembly in the alienation of lands were very fully and elaborately considered, and particularly its asserted power to authorize the Governor to sell the mission lands, and it was held that this body could not confer any power upon the Governor, and that its own power was restricted to what was conferred by the laws of colonization, which was simply to approve or disapprove of grants regularly made by the Governor under those laws.

"This grant being laid out of the case, the only question for determination is, whether the defendants constitute third persons within the meaning of the fifteenth section of the Act of March 3rd, 1851. That section provides that the decree of confirmation and patent shall be conclusive between the United States and the claimants only, and shall not affect the interests of third persons." [And here follows the matter quoted by plaintiff's counsel, to wit:] "The position of the defendants is, that as against them the patent is not evidence for any purpose; that as between them and the plaintiff the whole subject of title is open precisely as though no proceedings for the confirmation had been had, and no patent for the land had been issued. Their position rests upon a misapprehension of the character and effect of a patent issued upon a confirmation of a claim to land under the laws of Spain or Mexico.

"In the first place, the patent is a deed of the United States. As a deed, its operation is that of a quit-claim, or rather of a conveyance of such interest as the United States possessed in the land, and it takes effect by relation at the time when proceedings were instituted by the filing of the petition before the Board of Land Commissioners.

"In the second place, the patent is a record of the action of the government upon the title of the claimant as it existed upon the acquisition of the country. Such acquisition did not affect the rights of the inhabitants to their property. They retained all such rights, and were entitled by the law of nations to protection in them to the same extent as under the former government. The treaty of cession also stipulated for such protection. The obligation, to which the United States thus succeeded, was of course political in its character, and to be discharged in such manner and on such terms as they might judge expedient. By the Act of March 3rd, 1851, they have declared the manner and the terms on which they will discharge this obligation. They have there established a special tribunal, before which all claims to land are to be investigated; required evidence to be presented respecting the claims; appointed law officers to appear and contest them on behalf of the government; authorized appeals from the decisions of the tribunal, first to the District and then to the Supreme Court; and designated officers to survey and measure off the land when the validity of the claim is finally determined. When informed, by the action of its tribunals and officers,

that a claim asserted is valid and entitled to recognition, the government acts, and issues its patent to the claimant. This instrument is, therefore, record evidence of the action of the government upon the title of the claimant. By it the government declares that the claim asserted was valid under the laws of Mexico; that it was entitled to recognition and protection by the stipulations of the treaty, and might have been located under the former government, and is correctly located now, so as to embrace the premises as they are surveyed and described. As against the government this record, so long as it remains unvacated, is conclusive. And it is equally conclusive against parties claiming under the government by title subsequent. It is in this effect of the patent as a record of the government that its security and protection chiefly lie. If parties asserting interests in lands acquired since the acquisition of the country could deny and controvert this record, and compel the patentee, in every suit for his land, to establish the validity of his claim, his right to its confirmation, and the correctness of the action of the tribunals and officers of the United States in the location of the same, the patent would fail to be, as it was intended it should be, an instrument of quiet and security to its possessor. The patentee would find his title recognized in one suit and rejected in another, and if his title were maintained, he would find his land located in as many different places as the varying prejudices, interests, or notions of justice, of witnesses and jurymen might suggest. Every fact upon which the decree and

patent rest would be open to contestation. The intruder, resting solely upon his possession, might insist that the original claim was invalid, or was not properly located, and, therefore, he could not be disturbed by the patentee. No construction which will lead to such results can be given to the fifteenth section. The term "third persons," as there used, does not embrace all persons other than the United States and the claimants, but only those who hold superior titles, such as will enable them to resist successfully any action of the government in disposing of the property."

Reading the two quotations together, and in consecutive order, as they must be read to get a fair understanding of the point decided, and as they appear in the opinion, it will be seen at once that the language used and claimed by plaintiff's counsel as decisive here has no application whatever to a case like the one at bar, and that there is nothing inconsistent between that language and the later decisions rendered by the Court and written by the same distinguished Justice, hereinbefore cited and discussed. In the case then under consideration, the defendant was a mere intruder *without the shadow of a title*, attempting to impeach the validity of a patent issued by the United States in confirmation of a title acquired and held under Spanish and Mexican law, and the real question was whether he was a "third person," within the meaning of the Act of 1851. If, in the opin-

ion, are found isolated sentences, which, upon being severed from their context, can be distorted to apply to the case at bar, then we commend to the counsel who attempt the severance, and the application the language of Mr. Justice BALDWIN, and his quotations from Chief Justice MARSHALL and Chief Justice BEST, as found in *Hart* vs. *Burnett* (15 Cal., 598), concurred in by Mr. Justice FIELD, then Chief Justice of California, as follows:

" It is important to ascertain with precision of what description of adjudications this doctrine is predicated. A decision is *not even authority*, except upon the point actually passed upon by the Court and directly involved in the case. But even then, *the mere reasoning of the Court is not authority*. The point decided by the Court, and which the reasoning illustrates and explains, constitutes a judicial precedent. The books are full of cases in which learned Judges have earnestly deprecated the attempt to urge the mere *dicta* or the arguments of Judges, as authoritative expositions of the law. Chief Justice MARSHALL, in the case of *Cohens* vs. *The State of Virginia*, 6 Wheat., 399, thus defines the rule: " It is a maxim not to be " disregarded, that general expressions, in every " opinion, are to be taken in connection with the " case in which these expressions are used: If they " go beyond the case, they may be respected, but " they ought not to control the judgment in a sub- " sequent suit where the very point is presented " for decision. The reason of this maxim is obvi-

" ous. The question actually before the Court is " investigated with care, and considered in its full " extent. Other principles which may serve to " illustrate it are considered in their relation to " the case decided, but their possible bearing on " all other cases is seldom investigated." Chief Justice BEST, in *Richardson* vs. *Mellish*, 2 Bing., 248, says: "The expressions of every Judge must be taken with reference to the case on which he decides, otherwise the law will get into extreme confusion. That is what we are to look to in all cases. The manner in which he is arguing is not the thing—it is the principle he is deciding."

Smelting Company vs. *Kemp*, we have already considered. In *Steel* vs. *Smelting Company* (106 U. S., 446), cited by counsel, the opinion was again delivered by Mr. Justice FIELD. There is nothing in the opinion, the judgment or the case, conflicting with or inconsistent with *Smelting Company* vs. *Kemp*, *Wright* vs. *Roseberry* or *Doolan* vs. *Carr*; or with the position which we take here. The point decided in *Steel* vs. *Smelting Company* was whether a patent could be attacked collaterally on the ground of alleged irregularities in the proceedings had in the Land Department leading up to the patent; not whether it could be so attacked on the ground of want of jurisdiction to make the grant, or of title in the grantor.

The same may be said of all the other cases cited by counsel in immediate connection with the one

just considered, nearly all of which have already been discussed by us, or in the opinions from which we have quoted.

The next case cited and relied upon by the plaintiff in error is *City and County of San Francisco* vs. *Le Roy* (11 Supreme Ct. Rep., 364) decided March 2nd, 1891. If ever there was a case to which the language of Mr. Justice BALDWIN and Chief Justice FIELD, Chief Justice MARSHALL and Chief Justice BEST, hereinbefore quoted, should be applied it is this case of *City and County of San Francisco* vs. *Le Roy*, when attempted to be cited as *res ajudicata* of the question now under consideration. It was not so intended, and has no such effect. Mr. Justice FIELD also delivered the opinion of the Court in this case, and in the very beginning of his opinion he says:

"*It was conceded in the Court below that the premises, to remove the cloud from which the present bill is filed, were at the time 'pueblo lands' of San Francisco*—that is, that they were part of the lands claimed by the city as successor of a Mexican pueblo of that name; that they are within the limits of the city of San Francisco as prescribed by the charter of 1851, *and are within the four square leagues described in the decree of the United States Circuit Court for the district of California, entered May 18th, 1865, by which the claim of the city as such successor was confirmed and its boundaries established*, and also within the lines of the patent

of the United States for the pueblo lands, issued to the city in 1884. It was also stipulated that the decree of the Circuit Court and the patent of the United States should be considered as in evidence, and that all the statutes of California and of the United States affecting the pueblo lands of San Francisco might be referred to, in the consideration of the case, as though formally introduced in evidence.

"The plaintiffs in their bill rely principally upon the decree of the District Court for the Twelfth Judicial District of the State, in the case brought by William J. Shaw, to quit his title against the claim of the defendant herein, contending that the title to Shaw, through whom they deraign their interest, was thereby adjudged to be valid as against the defendant, and parties deriving title under the defendant, and that they are estopped from asserting against that decree any title or interest in the premises. *The decree was rendered upon a disclaimer of the City and County of San Francisco, by its attorney, that it had any right, title or interest in the premises described in the complaint, or any part thereof, at the commencement of the suit, and its consent that the plaintiff might take judgment therein in accordance with his prayer.* Whatever authority the attorney of the City and County may have had to conduct its ordinary litigation, he had none to relinquish its authority over rights reserved for the benefit of the public by the Van Ness ordinance; *and the property in that case was claimed, as will be afterwards seen, under that ordinance alone.* The City and County of San

Francisco had previously succeeded to all the rights of property, and became subject to all the liabilities of the City. Act of April 19, 1856, consolidating the government of the City and County of San Francisco. The plaintiffs did not, however, on the hearing, rely principally, or to any great extent, upon any estoppel by that decree, but endeavored to establish their claim of title by conveyances from former occupants of different parcels of land, known as the "Kissling Tract," and the "Thorn and Center Tract," *and of the rights inuring to the occupants under what is known* from its reputed author, *as the Van Ness Ordinance*," the object of which was to settle and quiet the title of persons in possession of lands in the City of San Francisco; and under the Act of the Legislature of the State of California, passed in March, 1858, ratifying and confirming the ordinance; and under the Act of Congress relinquishing and granting to the city all the interest of the United States to lands within the corporate limits of the Act of 1851, in trust for the uses and purposes of that ordinance. They also claimed the benefit of a deed of the tide-land commissioners of the State to Eugene L. Sullivan, one of the grantors of William J. Shaw, dated December 3, 1870, which purported for the consideration of $352.80 to release to the grantee the right, title and interest of the State of California to the premises therein described."

The learned Justice then reviews the facts and the law bearing upon the question of the rights of the City and County of San Francisco in the four

square leagues of pueblo lands, and recites the legislation, municipal, state and national, which had been enacted for the protection of its title thereto, and for the disposition thereof. This has been so often done that this portion of the opinion need not be repeated here; but in it the doctrine is again affirmed, and the declaration again made, that "*The title of the City, therefore, rests upon the "decree of the Court recognizing its title to the four "square leagues, and* ESTABLISHING THE BOUNDARIES, "and the confirmatory Acts of Congress." After this review, we quote further from the opinion as follows:

"The claims of the grantors of the plaintiffs to the title to the lands, through conveyances from Kissling and from Thorne and Center, are fully sustained by the evidence. Kissling settled upon a parcel of the land in relation to which this suit is brought, in March, 1849. He was at the time a native of Denmark, but had declared his intention to become an American citizen, and in the notice which he recorded of his claim he represented it as a preemption right to 160 acres of land in the District of San Francisco. That claim of itself was of no value whatever, as the lands were not subject to pre-emption, not being lands of the United States, nor would they have been if owned by the United States, except under the town-site Act, because they were within the limits of what was then a town; but a large portion of the tract thus taken up was *fenced in by Kissling, occupied by*

him and a portion of it cultivated. His occupation was continuous during the whole period required by the ordinance to enable him to have the benefit of the transfer it made. He therefore acquired as complete a title in the interest which the city then held in the property as it was possible for the city to convey, under the Van Ness Ordinance and the confirmatory legislation of the State and the United States. The same may be said of the claim taken up by Thorne and Center, on the 5th of August, 1850, and which purported to cover 60 acres. Of itself, it was, like the other, of no validity, and conferred no rights for the land was not public land open to acquisition in that way. But these parties *inclosed the land, occupied and cultivated it*, and exercised acts of ownership over it, until the 15th of July, 1854, when they sold four and one half acres of it to one Charles V. Stewart. They continued, however, to exercise ownership over the residue during all the period required by the Van Ness Ordinance to obtain its benefits and the transfer of title from the city. As to the four and one-half acres sold, the grantee continued in the possession and use of that portion also, during the period required by the ordinance.

"The title to the lands thus claimed by Kissling and by Thorne and Center, and by Stewart as a purchaser from them of four and a half acres, became, *by operation of that ordinance* and the confirmatory legislation mentioned, vested in those parties, and by their conveyance passed to William J. Shaw, and was by him conveyed to Eugene L. Sullivan, and thence to the plaintiffs in this suit.

All the right, title, and interest which the city held, and which could be conveyed under the Van Ness ordinance, had therefore passed to Shaw when the suit to quiet his title was commenced and carried to judgment in the District Court of the twelfth judicial district of the state, and whatever benefit Shaw had acquired by that decree in his favor inured to the benefit of his grantees, the public rights reserved by the Van Ness ordinance being necessarily excepted. One of those was a reservation, notwithstanding its grant, of lands then occupied or set apart for public squares, streets, and sites for school-houses, city-hall, and other buildings belonging to the corporation, and the decree in this case should have excepted from its operation the lands thus reserved. An effort was made before the examiner, who took the evidence in the case to do away with the reservation by the verbal statement of a witness that the premises described did not include 'any school-lots, engine-lots, hospital-lots, or property dedicated for street purposes or public squares;' but such testimony was objected to as incompetent, and as not being the best evidence the subject admitted of, and the objection was in our judgment well taken. If there were no reservations, as specified in the ordinance, the fact should have been established by the public records of the city and county. Its property reserved by statute from private ownership for public uses is not to be sacrificed or lost upon loose verbal testimony of the character offered."

Then follows the matter quoted by counsel for plaintiff in error on pages 41 and 42 of their brief;

but nowhere in the entire case, either in the statement of facts which precedes the opinion, or in the opinion itself, is there anything to indicate that the land in controversy in that suit is or ever was "below ordinary high water mark," or even that any portion of it was "swamp and overflowed land." On the contrary, all the inferences, from the language used, are the other way—as the land was settled upon, inclosed, used, occupied and cultivated; and it was this *possessio pedis* which enabled the plaintiff below (defendant in error) to recover, as he did recover, *under title claimed under, not against, the city, and under the Van Ness ordinance.* The judgment of the Court below in favor of Le Roy was modified simply to the extent that he held the land subject to the terms of the ordinance as to streets, public squares, etc., and so modified was affirmed. The entire discussion, therefore, on the subject of "swamp and overflowed lands," was mere matter of opinion and illustration, not necessary to the decision of the case, and no decision or judgment was founded upon it. In the language of *Hart* vs. *Burnett*, above quoted, the "*decision is* "*not even authority, except upon the point actually* "*passed upon by the Court and directly involved in* "*the case.*"

Counsel for the plaintiff in error themselves concede, at page 44 of their brief, that there is no variation in the Federal decisions, from *Patterson*

vs. *Winn* (11 Wheat., 381), down to the present time, "from the doctrine that if the granting officers have no power, under any circumstances, to make the grant, the grant can be attacked under any action in which it is sought to prove a title by it or a right under it." That is exactly what we claim; and to that we add the proposition that, in this case, the granting officer had no power, under any circumstances, to make a grant below ordinary high-water mark of the bay of San Francisco. That was the eastern boundary of the *pueblo*, as established by the laws of Mexico, beyond which the *pueblo* of Yerba Buena, or its successor, the City of San Francisco, never had power to go; and beyond which it never claimed the right to go, either in its petition or in any of its proceedings for the purpose of securing confirmation of its grant; that, in and by the decree of confirmation which it secured, it was adjudged, determined and decreed that ordinary high-water mark of the bay of San Francisco (as the same existed at the date of the conquest, to-wit: the 7th of July, 1846), was the eastern boundary of the claim. This being so, then everything beyond that boundary—everything below ordinary high-water mark—passed from the conquered to the conquering sovereign at the date of the conquest, and from the conquering passed to the sovereign State of California upon its admission to the Union, two and

one-half years before the initiation of the proceedings instituted for the purpose of securing confirmation of the grant. It follows, then, not only that the pueblo had no claim below ordinary high-water mark under either the original grant, or under the laws of Spain or Mexico, or under the decree of confirmation, in subordination to the location of which the State of California would take her title, and that the title having thus passed, unencumbered by any claim under the Mexican laws, "the locating officers, in the matter of the pueblo lands of San Francisco, had *no* jurisdiction to survey, locate or patent the lands," although they did have jurisdiction to survey, locate and patent the lands described in the decree; but this eastern boundary being fixed and determined by law, by grant and by confirmation, it was their duty to follow the line so fixed, and whenever they departed from that line and included within their survey lands lying outside the line, their patent became inoperative and void to the extent that it so included lands outside the fixed and determined boundary of the grant, *for want of jurisdiction.*

In the late case of *Davis* vs. *Wiebold*, (11 Supreme Ct. Rep. 628) the opinion was again written by the same distinguished Justice, and the doctrine of *Smelting Company* vs. *Kemp*, *supra*, was again emphatically affirmed. This was a case of conflict

between one holding under a patent for town site and a subsequent patent of the land as mineral, both issued by the Land Department of the United States. After a statement of the facts and an able review of the former decisions bearing upon the question, the learned Justice says:

"When the patent to the mining company was "offered in evidence an objection was taken on "the ground that the exception contained in it "excluded all town lots from the grant, and it was "necessary for the plaintiff to show that the prop- "erty in controversy did not consist of lots thus "excepted. The exception in the patent went "only to the exclusion of the lots from interfering "with the surface of the land granted with the "mining lode. But we do not attach any impor- "tance to the exception, for the officers of the land "department, being merely agents of the Govern- "ment, have no authority to assert in a patent any "other terms than those of conveyance, with re- "citals showing compliance with the conditions "which the law prescribes. Could they insert "clauses in patents at their own discretion, they "could limit or enlarge their effect without war- "rant of law. The patent of a mining claim carries "with it such rights to the lands which includes "the claim as the law confers, and no others, and "these rights can neither be enlarged nor dimin- "ished by any reservations of the officers of the land "department, resting for their fitness only upon "the judgment of those officers. *Deffenback* vs. "*Hawke*, 115 U. S., 392, 406, 6 Sup. Ct. Rep. 95.

" If, after the introduction of the town-site patent " and the deed to the defendant, the objection had " been raised to the jurisdiction of the Land " Department to issue the patent in question for " minerals in lands which had been previously " conveyed to the defendant, a much more serious " question would have been presented. The laws of " Congress provide that valuable mineral deposits in " lands of the United States shall be open to ex- " ploration and purchase. They do not provide, " and never have provided, that such mineral " deposits in lands which have ceased to be public, " and become the property of private individuals, " can be patented under any proceedings before " the land department or otherwise. Proceedings " for the acquisition of title to a mining claim " within a town-site, commenced before the issue " of a town-site patent, could undoubtedly " be prosecuted to completion afterwards. The " right initiated by the location of the mining " claim would not be defeated by a subsequent " conveyance of the title to the land in which the " mining claim was situated. But it is not preceived " where the jurisdiction exists under the laws of " the United States to grant a patent for a mine on " lands owned by private individuals—which was " the case here—if the lots for which the defend- " ant received a deed were included within the " town-site patent and the location of the mining " claim was subsequently made." * * * * * * * * * * * * * "We agree to all that is urged by coun- " sel as to the conclusiveness of the patents of the " land department when assailed collaterally in

" actions at law. We have had occasion to assert " their unassailbility in such cases in the strongest " terms, both in *Smelting Co.* vs. *Kemp*, 104 U. S., " 636, 640–646, and in *Steele* vs. *Smelting Co.* 106 U. " S., 447, 451, 452, 1 Sup. Ct., Rep. 389. They are " conclusive in such actions of all matters of fact " necessary to their issue, *where the department had* " *jurisdiction to act upon such matters, and to deter-* " *mine them; but if the lands patented were not at the* " *time public property, having been previously disposed* " *of*, or no provision had been made for their sale " or other disposition, or they had been reserved " from sale, the department had no jurisdiction to " transfer the land, and their attempted convey- " ance by patent is inoperative and void, no mat- " ter with what seeming regularity the forms of " law have been observed."

The case of *Iron Silver Mining Company* vs. *Campbell*, (135 U. S. 286) where the opinion was written by Mr. Justice MILLER, is not inconsistent with the position here taken. There the contest was between claimants under two conflicting patents issued by the United States, one, and the elder one, for a placer mining claim, the other and junior patent being for a quartz mining lode situated within the placer mining claim, and not shown to have been known to exist at the time the patent for the placer mining claim was issued. Although the elder patent expressly reserved upon its face all the mining lodes existing within the exterior boundaries of the land therein described, it was

held that such reservation applied to lodes known to exist at the time the patent was issued, and that upon the trial of an action of ejectment between claimants under the two patents the claimant under the placer mining patent would have a right to insist upon proof and finding as to whether such lode was known to have existed at the time his patent was issued; otherwise that his, the elder patent, must prevail.

In the case at bar the claim of the respective parties is under two conflicting grants; one, a grant claimed to have been made by the Government of Mexico before the conquest; the other claimed to have been made by the Government of the United States in and by Act of Congress operating as a grant *in presenti*—and this, whether it be held that the right of the State depends upon the act admitting her into the Union, or upon the swamp land Act of September 28th, 1850. The elder or Mexican grant was inchoate in its character. Whether or not there was such a grant, and if so, of what it consisted, remained undetermined until the decree of confirmation fifteen years after the grant to the State, and upon proceedings initiated two and one-half years after such grant. It was then found, adjudged and determined that the grant as originally made by the Government of Mexico was bounded on the east by ordinary high water mark of the Bay of San Francisco (as the same existed

at the date of the conquest, to-wit: July 7th, 1846) and it is under this grant that the plaintiff in error claims. Although it is the elder grant, it was thus adjudged and determined that it did not include lands below ordinary high water mark, and consequently did not affect the lands in controversy here. The grant to the State therefore, under whichever act it is held to have been made, is, as to the lands in controversy in this action, the elder grant and passed the title out of the United States, so that a claimant under the State has a right, in this action of ejectment to show that the land in fact is such as was not included in the Mexican grant, and such as was in fact included in and passed by the grant to the State. The doctrine that the elder patent must prevail as laid down in *Iron Silver Mining Co.* vs. *Campbell*, applies with equal force in this case, for the reason that if there is any grant whatever to the city under which the plaintiff in error claims, it is a grant made not by the Mexican government, but made by the United States in and by its patent, thirty-four years after the grant made *in presenti* by Act of Congress to the State. The language of Mr. Justice MILLER in the case just referred to is not, therefore, inappropriate here. He says:

"We are not ignorant of the many decisions by which it has been held that the rulings of the land officers in regard to the facts on which patents for

land are issued are decisive in actions at law, and that such patents can only be impeached in regard to those facts by a suit in chancery brought to set the grant aside. But those are cases in which no prior patent had been issued for the same land, and where the party contesting the patent had no evidence of a superior legal title, but was compelled to rely on the equity growing out of frauds and mistakes in issuing the patent to his opponent.

"Where each party has a patent from the Government, and the question is as to the superiority of the title under those patents, if this depends upon extrinsic facts not shown by the patents themselves, we think it is competent in any judicial proceeding where this question of superiority of title arises, to establish it by proof of these facts. We do not believe that the Government of the United States, having issued a patent, can by the authority of its own officers invalidate that patent by the issuing of a second one for the same property."

As the Government of the United States cannot by authority of its own officers invalidate a patent once issued by the issuing of a second one for the same property, so it cannot invalidate a grant theretofore made by Act of Congress, by the subsequent issuing of a patent for lands included within such grant.

This doctrine is announced and fully sustained by Mr. Justice SAWYER, and concurred in by Mr. Justice SABIN in the Circuit Court of the Northern

District of California, in the case of *Francœur* vs. *Newhouse*, (40 Federal Rep. 618), where the contest was between a claimant under the grant *in presenti* made by Act of Congress to the Central Pacific Railway Company, and an adverse claimant under a patent subsequently issued by the United States, for a gold bearing lode within said grant. The grant was held to prevail over the patent.

The Law of the Grant.

We have already intimated that it was hardly correct to liken the claim of a pueblo to a private land grant. The reason for this is that, as we understand the Spanish law, the claim of a pueblo never amounted to seisin of the fee, as at the common law, but was a right to the use of a certain quantity of land at and about the site of the village or town, with power in the local authorities to grant lots therein, in the name of or under and by authority of the sovereign, to private ownership; so much thereof as remained ungranted, to be and remain public property for the common use; the sovereign all the time having and retaining power to make "private land grants" within the limits "of the track thus set apart to the *pueblo*. That power was frequently exercised in the pueblo of San Francisco, and several "private land grants" within the limits of that pueblo were made by the

sovereign authority of Mexico, and have been confirmed by the government of the United States.

In support of this proposition, we quote from *Recopilacion de Indias*, giving the original and translation thereof, the latter made by R. C. HOPKINS, Esq., for many years keeper of the Spanish Archives at San Francisco.

" Territorio y terreno para nueva poblacion no
" se pueda conceder, ni tomar por asiento en puer-
" tos del mar, ni en parte que en algien tiempo,
" pueda redundar en perjuicio de nuestro corona
" real, ni de la republica, porque, nuestra voluntad
" es, que queden reservadas para nos."

Ley VI. Liber 4. Tituto VII.

(*Translation*): " Territory and land for the es-
" tablishment of a new ' poblacion ' cannot be con-
" ceded or taken for the seat thereof in seaports,
" nor in places, which at any time, may be prejudi-
" cial to our royal crown; or to the public welfare,
" because, it is our will that they be reserved for
" us."

" El terreno y territorio, que se diese a poblador,
" por capitulacion, se reparta en la forma siguiente;
" Sacase primero, el que fuere necesario, para los
" solares del pueblo, y exido competente, y dehe-
" sas, en que pueda pastear abundantamento el
" ganado, que han de tener los vecinos, y mas,
" otro tanto para los propios del lugar; el resto del
" territorio y termino, se haga en cuatro partes; la

" una de ellas, que escogiese, sea para el que sea
" obligado a hacer el pueblo, y las otros tres, se
" repartara en suertes iquales, para los pobladores."

Ley VII of the same book and Title.

(*Translation*): "The territory which may be
" given for settlement by 'capitulation' (contract)
" shall be distributed in the following manner:
" First, there shall be set apart what may be neces-
" sary for the house-lots (solaras) of the pueblo,
" and for *exidos*, and for pasture grounds, for the
" stocks of the inhabitants; and besides, another
' part, for the '*propios*' of the place; and the
" remainder of the extent of the territory shall be
" divided into four parts; one of which that will
" be selected shall be for the person who may
" have obligated himself to establish the *pueblo*,
" and the other three parts shall be divided up
" into lots (*suertes*) of equal size, to be distributed
" to settlers."

Law XIV, after describing how lots shall be distributed to settlers, concludes as follows:

" Y las demas quedan valdias, para que Nos
" hagamos merced a los que de nuevo fueren a pob-
" lar; y de estas tierras hagan los viceroys separar
" las que piensen conmenientes, para propios de
" los pueblos, que no les treviesen, de que se
" ajude a la paga de salarios, de los Coriegedores;
" dejando *exidos*, *dehesas y pastos bastantes*, como
" esta proverieda, y asi lo previene."

(*Translation*): " And remainder will remain
" vacant, to the end that we may make of the

" same, gifts to new settlers (pobledores), and of " these lands, the Viceroys shall set apart what " may be considered necessary for *propios* of such " *pueblas* as have none, to assist in paying the " salaries of '*Corregedores*,' leaving sufficient for " *exidos* and *dehesas*, for pasturage, as is provided.',

Turning from this to " *Escriche's Diccionario de Legislacion y Jurisprudencia*," a standard authority, we find the following as showing what remains in the government:

" *Ribera*. La margen y orilla del mar o rio; " esto es, el lugar, ó espacio que cubre sus aguas, " el el tiempo, que mas crece, con su flujo, y reflujo " periodicó; sea en invierno, ó su verano, sin saler " de su madre. Las riberas del mar pertenecem, " encuanto a la propiedad, a la nacion dueña del " pais, de que hacen pato; encuanto al uso, a todos " las banbres."

(*Translation*): " The margin or shore of the sea " or river; that is the place, or space, which is cov- " ered by its waters, at the time of the highest " tide, in its periodical ebb and flow, be it in the " winter or summer, without leaving its bed. The " sea-beach (*riberas del mar*) with respect to the " ownership pertains to the nation which is mis- " tress of the country of which it forms a part, and " with respect to the use, to all men."

From the Plan of Pittic we quote the following:

" *Instruccion aprobada por S. ell, que se forma* " *para el Establecimiento de la Nueva Villa del Pittic*

" *en la Provincia de Sonora; manda ad optar á las* " *mas demas nuevas Poblicanes projectadas y que* " *establecien en el Distrito de esta Comandancea General.*"

* * * * * *

(*Translation*): " *Instructions, approved by His* " *Majesty, which were formed for the establishment of* " *the new Village of Pitic in the Province of Sonora,* " *ordered to be adapted to the other new Poblacanes,* " *projected and which may be established in the District* " *of this Comandanda General.*

" Art° 2. Con arieglo á lo d ispuesto en la ley " 6° Tit° 5, del nusmo libro 4 para las villas de " Espanoles, que se funden por capitulacion ó " asiento, podra concedense cuatro leaguas en cua- " tro ó prolongado segun la proporceone la mejor " disposieone del terreno."

* * * * * *

" Art° 2. In accordance with the requirements " of Law 6° Title 5, of the same Book 4, for the " villages of Spaniards, which may be founded by " capitulacion (contract) or settlement that may " be conceded four square leagues, in a square or " oblong shape, according to the lay of the land."

In the foregoing quotations from the Spanish, we have omitted all those parts which refer to the manner of distribution of the lands after the pueblo is founded and to the regulation and management of its government.

We come now to an examination of *Hall's Mexican Law*, and in Chapter VII, Sections 110 and

following, commencing at page 50, we find the law in relation to pueblos or towns. Section 110 reads as follows:

"There were two methods of establishing towns: 1, By virtue of a capitulation or agreement entered into between a given person and the government, whereby the contractor was to establish a town upon the conditions established by law. According to the ordinances 88 and 89 of Philip II, which are embodied in law 6, book 4, title 5, of the Recopilacion de las Indias, the contractor was to furnish at least thirty inhabitants (vecinas) and each of them to build a house, and to furnish a certain number of stock; and if he complied with all the conditions, he was to have assigned him four square leagues of land in a square or oblong form according to the condition of the land. The limits of the town were not to be within five leagues of any other town of Spaniards; nor to do any damage to any Indian town or to any private person. Ordinance 100 of Philip II, which is law 7 of said book and title, modifies the foregoing by permitting the contractor to furnish not less than ten inhabitants."

Sections 111 and 112 relate to the powers of the contractor and the division of the land. Section 113 relates to the form of the pueblos and says that its size is to be "in proportion to the inhabitants and according to the probabilities of the growth of the town."

Section 114 reads as follows:

"2—Towns were established by the government. The governor of the province examined the locations as to the conveniences and advantages which would arise from the establishment of towns in certain places; and he determined whether the town to be established should be a city, villa, or place; and in conformity with what he declared, the municipal government was formed. Law 2, book 4, title 7."

Sections 115 and 116 relate to the division of the land, etc., in pueblos established by the Government.

Section 117 reads as follows:

"There never existed any general law fixing four square leagues as the extent of pueblos or towns. That extent of land was assigned to pueblos founded by contractors for Spaniards, by law 6, title 5, book 4, of the laws of the Indies. Those formed by the government, independent of contractors, were only limited by the discretion of the governors of the provinces, and viceroys, subject to approval or disapproval by the king. There are numerous pueblos in Mexico which have less and many that have more than four square leagues."

Speaking of the town of Pitic and the cèdula in reletion thereto, the author says:

"There were some special laws and cèdulas issued in relation to certain locations which designated that amount of land. The royal cèdula as

to the town of Pitic, now Hermosillo, in Sonora, provided four square leagues for that settlement.

"But this decree or cèdula states that it is issued in accordance with law 6, title 5, book 4, of the laws of the Indies, for the formation of pueblos by Spaniards (not Indians), and which law is for the government of pueblos founded by virtue of a capitulation, an agreement with some founder. And it is but a reiteration of said law, namely, that in the future all pueblos to be formed by founders in that commandancy shall be of the same extent of four square leagues."

And at Section 121, speaking of the opinion of Nava, he says:

"Don Pedro Nava, commandant at Chihuahua, must have taken the same view of the law, when he fixed the extent of four leagues in his order 'to avoid doubts and disputes in the future,' and because he 'considered it to be sufficient.' Had a general law been in force as to the limits of all pueblos to be founded, there would have been no room for 'doubts and disputes in the future,' as to the quantity of land each and every pueblo was entitled to, and he would not have had 'to consider what amount is sufficient.' It would seem that the above law 1, book 4, title 13, and the said order, placed the question beyond discussion."

And in Section 122 on the subject of the fee of the land embraced within pueblos, the author says:

"The fee of the land embraced within the limits of pueblos continued to remain in the sov-

ereign, and never in the pueblo as a corporate body. Under the jurisprudence of Spain, no lands within a pueblo were ever sold to a private individual, except the house-lots (solares), the suertes, peonias and cavallerias, which were given to the settlers or pobladors for cultivation. These were to be possessed and worked continuously for four years before the grantee could dispose of them as his own, as provided in law I, book 4, title 12, of the laws of the Indes. All the other pueblo lands were held by the sovereign for the benefit of the inhabitants thereof."

As tending to show the jurisdiction of the pueblo with reference to the water-front at San Francisco, we quote the following authorization of October 27th, 1835, found in Dwinelle's Colonial History, Addend., page 42:

"OCTOBER, 1835.

"*The Ayuntamiento of San Francisco, authorized* " *to grant building lots.*

" (Seal of the Political Government)
(of Upper California.)

"The most excellent Territorial Deputation, " in session of the twenty-second of September, " approved that the AYUNTAMIENTO OF THAT " PUEBLO may grant lots which do not exceed " one hundred varas, for the building of houses in " the place named Yerba Buena, at the distance of " two hundred varas from the shore of the sea,

" paying to the Ayuntamiento the fees which may
" be designated to him (it? que se la señal) as per-
" taining to the propios, and arbitrios, and being
" subject to observe the order for forming the town
" in lines, (en linea de major policia) in accordance
" with the ordinance regulating the Police, which
" I communicate to you that you may make it
" known to the inhabitants of that PUEBLO, in
" order that they may not apply with their memo-
" rials to this Political Government, as it is one of
" the favors which the Ayuntamiento can grant.

" God and Liberty!

" MONTEREY, October 27, 1835.

JOSE CASTRO."

" Senor Alcalde de San Francisco de Asis.

Mr. Wheeler, in his work on Land Titles in San Francisco, at page 13, says:

" About this period (1836) José Joaquin Estudillo applied to the Legislature for a grant of 200 varas in Yerba Buena. The application was referred to the Committee on Municipal Lands, who reported in favor of granting him a lot, but not to exceed the number of varas allowed by Article 15 of the Regulations of Colonization, which was 100 varas square. Señor Alvarado, at that time a member of the Territorial Assembly, requested that, in order to stimulate the citizens of that place to form a population, authority might be given in general to the Ayuntamiento of San Francisco to grant house lots at a distance of 200 varas

retired from the beach; and submitted the following, which was approved and passed:

"'The Ayuntamiento of San Francisco may concede the said house lot, at a distance of 200 varas retired from the shore, and may permit other citizens to establish themselves there within the same restrictions conforming to the general order of the town.'"

"Under this authority, grants were subsequently made by the local authorities, without prior application to the Governor or Territorial Deputation, except in those cases where the land was within the 200 varas of the beach, or was greater in quantity than they were authorized to grant. The restriction named in the Act last referred to, was no doubt in force as late as the 20th of April, 1846; for, in reply to a petition of Nathan Spear, made April 19th, 1846, for a grant of 50 varas on the beach in front of his house in Yerba Buena, the Prefect says: 'The undersigned has no authority to make the above mentioned grant, as it is near the border of the water.'"

Without dwelling upon other authorities, which were cited in the Court below and which might here again be cited, we come to the decree of confirmation of this very pueblo, entered on the 18th of May, 1865, and which became final long before the patent was issued and prior to the making of any survey thereunder. From this decree, we quote the following:

"The land of which confirmation is made is a tract situated within the County of San Francisco, and embracing so much of the extreme upper portion of the peninsula *above ordinary high-water mark* (as the same existed at the date of the conquest of the country, namely, the seventh of July, A. D. 1846) on which the City of San Francisco is situated, as will contain an area of four square leagues—said tract being bounded on the north and east by the Bay of San Francisco; on the west by the Pacific Ocean; and on the south by a due east and west line drawn so as to include the area aforesaid, subject to the following deductions, namely: such parcels of land as have been heretofore reserved or dedicated to public uses by the United States; and also such parcels of land as have been by grants from lawful authority vested in private proprietorship, and have been finally confirmed to parties claiming under said grants by the tribunals of the United States or shall hereafter be finally confirmed to parties claiming thereunder by said tribunals, in proceedings now pending therein for that purpose; all of which said excepted parcels of land are included within the area of four square leagues above-mentioned, but are excluded from the confirmation to the city. This confirmation is in trust, for the benefit of the lot-holders under grants from the Pueblo, Town, or City of San Francisco, or other competent authority, and as to any residue, in trust for the use and benefit of the inhabitants of the city.

FIELD, Circuit Judge.

San Francisco, May 18th, 1865."

It is no answer to the position we take here to say that the Mexican Government, being sovereign, had power to make grants of lands below ordinary high water mark. The fact that she had such power is not disputed, but the question in this case is did she exercise that power. Under the citations made, both from the Spanish and from the English, we submit that the laws themselves prohibited the making of such grants to pueblos, and that at the pueblo of San Francisco the local authorities were prohibited from making grants which were less than 200 varas from the sea-shore. That the Mexican Government did make grants of lands which are now commonly described as salt marsh, and which lie below the high water mark of the neap tides, is shown to have been true in several instances in California, but in none of them did such grants include the sea-shore or water front of any village or town, or of any place of traffic or trade.

What is "Ordinary High-Water Mark"?

Bouvier, in his Law Dictionary, under the title "High-Water Mark," defines it thus: "That part "of the shore of the sea to which the waves ordi- "narily reached when the tide is at its highest," citing 6 *Mass.*, R. 435; 1 *Pick.* R. 180; 1 *Halst*, R. 1; 1 *Russ*, on Cr., 107; 2 *East*, P. C., 103.

In Rapalje and Lawrence's Law Dictionary, under the same title, it is defined to be "That part of the shore to which the waves of the sea ordi- " narily reach at high, or flood tide. The term is " also occasionally applied to the highest point on " the shore of non-tidal streams in which fresh " water ponds and lakes are constructed by dams, " to which the dams can ordinarily raise the " water."

In *Teschemacher* vs. *Thompson*, 18 Cal., 11, it is said that, by the term "ordinarily high-water mark" as applied to tide waters, is meant the limit reached by the neap tides, that is those tides which happen between the full and change of the moon, twice in twenty-four hours.

Bouvier, under the title of "Sea," gives as one of its definitions "Waters within the ebb and flow of the tide are to be considered the sea," citing *Gilp*, R: 526; and under the title of "Sea Shore" gives as the definition "That space of land, on the " border of the sea, which is alternately covered " and left dry, by the rising and falling of the tide; " or, in other words, that space of land between " high and low water-mark," citing *Harg.* Tr. 12; 6 Mass., 435, 439; 1 *Pick*, 180, 182; 5 *Day*, 22.

And as third and fourth subdivisions, under this title, he says:

"3. By the Roman law, the shore included the " land as far as the greatest wave extended in win-

" ter; *est autem lilttus maris, quatenus hibernus, fluc-*
" *tus maximus excurrit.* Inst. lib. 2, t. 1, s. *Littus*
" *publicum est eatenus qua maxime fluctus exoustuat.*
" *Dig.* lib. 50, t. 16, s. 112.

" 4. The Civil Code of Louisiana seems to have
" followed the law of the Institutes and the Digest,
" for it enacts, Art. 442, that the 'sea-shore is that
" 'space of land over which the waters of the sea
" 'are spread in the highest water, during the win-
" 'ter season.' Vide 5 Rob. Adm. R. 182: Dougl.
" 425; 1 Halst. R. 1; 2 Roll. Ab. 170; Dyer, 326;
" 5 Co, 107; Bac. Ab. Courts of Admiralty, A; 1
" Am. Law Mag. 76; 16 Pet. R. 234, 367; Ang.
" on Tide Waters, Index, tit. Shore; 2 Bligh's N.
" S. 146; 5 M. & W. 327; Merl. Quest. de Droit,
" mots Rivage de la Mer; Inst. 2, 1, 1; 22 Maine,
" R. 350. For the law of Mass. vide Dane's Ab. c.
" 68, a 3, 4."

Angell on Tide Waters, page 73, says: " The
" rule as to ordinary high water mark applies as
" well to the sea-shore of an arm of the sea, or
" wherever the tide flows and re-flows, as to the
" shore of the sea itself; and an arm of the sea is
" considered as extending as far into the interior
" of a country as the water of fresh rivers is pro-
" pelled backward by the ingress and egress of the
" tide."

Bouvier, under the title of " Tide " says:

" In a recent English case this ownership, viz.,
" of the Crown, or in this country of the State, has

" been held to be limited by the average of the " medium high tides between the spring and neap " in each quarter of a lunar revolution during the " year, excluding only extraordinary catastrophes " or overflows. *De Gex, M. & G.*, 206. See also " 3 *Barnw. & Ald.*, 967; 5 *Id.*, 268; 2 *Dougl.*, " 629; 7 *Pet.*, 324; 1 *Pick.*, (Mass.), 180; 2 *Johns.* " (N. Y.). 357."

The leading case cited above from 4 *De Gex, M. & G.*, 206, (*Attorney General* vs. *Chambers*,) was decided in 1854 by the joint opinion of Baron Alderson and Justice MAUL. In it the Lord Chancellor, adopting the language of the other judges, says:

" The learned judges, whose assistance I had in " this very obscure question, point out that the " limit indicating such land " (belonging to the Sovereign and composing the " shore ") " *is the* " *line of the medium high tide between the springs and* " *the neaps.* All land below that line is, more often " than not, covered at high water, and so may " justly be said, in the language of Lord Hale, to " be covered by the ordinary flux of the sea. This " cannot be said of any land above that line; and " I therefore concur with the able opinion of the " judges, whose valuable assistance I had, in think- " ing that the *medium line must be treated as bound-* " *ing the right of the Crown.*"

The judges, whose advice to the Lord Chancellor is alluded to in the above extract, close that advice in these words:

" We therefore beg to advise your Lordship that, " in our opinion, the *average of these mean tides* in " each quarter of a lunar revolution during the " year gives the limit, in the absence of all usage, " to the rights of the Crown on the sea-shore."

That this rule of the common law has been recognized as the rule fixing ordinary high-water mark at places where the common law governs, is not, and cannot be denied.

Says Angell on Tide Waters, p. 71: " The com- " mon law on this subject, as above stated and ex- " pounded, is recognized in this country by the " highest authority." Citing *Peyroux* v. *Howard*, 7 Pet., 324.

Ordinary high-water mark, as understood in the civil law, differs from that of the common law. Angell on Tide Waters defines these words " ordinary high-water mark " as follows:

" By the former" (the civil law), " high-water " mark is determined by the highest tides, and " the shore, it is understood, includes the land as " far as the greatest wave extends itself in winter. " *Est autem littus maris quotenus hibernus, fluctus* " *maximus ex currit*, according to the institutes."

It is because this is the definition of the civil law that Judge FIELD says, in *United States* v. *Pacheco*, that the claimant would gain nothing by appealing to the definition of the civil law from that of the common law. (2 Wall., 590.)

Of the Survey.

We have already shown from the statute and from the decisions of this Court that it was the duty of the executive officers of the Government, in making the surveys for this patent, "to follow "the decree of confirmation as closely as practica- "ble whenever such decree designated the specific "boundaries of the claim."

By Section 2395 of the Revised Statutes of the United States, it is provided:

"The public lands shall be divided by north and "south lines, run according to the true meridian, "and by others crossing them at right angles, so "as to form townships of six miles square, unless "where the line of a reservation, or of tracts of "land heretofore surveyed or patented, *or the "course of navigable rivers*, may render this im- "practicable; and, in that case, this rule must be "departed from no further than such particular "circumstances require."

We have been unable to find any statutory rule regarding the survey of private land claims or of pueblos which authorizes the practice adopted in this case, of running from point to point across, and including within the survey, navigable waters or the lands under them; but, as shown by the face of the plat annexed to and made a part of this patent, that course was pursued in this case and, by pursuing it, a considerable tract of land,

including the land for the recovery of which this action is brought, lying below ordinary high-water mark, was included within the patent; including the whole length and breadth of the estuary or arm of the bay, commonly called "Mission Creek," and land covered by navigable waters just outside the mouth of Mission Creek, in what is ordinarily called "Mission Bay." Mission Creek is as much an arm and a part of the Bay of San Francisco as the arm of a man is a part of his body. Its waters are the waters of the bay as the blood in a man's arm is the blood of his body. From the record (folios 7 and 8), it is shown that the tide-waters of the Bay, from the earliest history of the City, have flown and still flow up this creek to a point far above the lands in question. They were therefore a portion of the sea-shore under the common law and the civil law, were below ordinary high water mark, and not included within the decree of confirmation; and the act of surveying them in the grant and including them in the patent was in violation of such decree and in direct conflict with the law under which the surveys were made, and, consequently, without jurisdiction on the part of the officers making such survey and patent; and the lands included within the patent in excess of such jurisdiction, are not affected thereby, particularly so since they never were embraced within the claim of the pueblo; and, not having been so

embraced within the claim, passed to the State long before the initiation of any proceedings culminating in the issue of the patent.

A glance at the map will show that Mission Creek, although called by the name "creek," is in no sense a river or stream *feeding the bay*, but it is an estuary *fed by the bay*, navigable not only in law but in fact, and so proved to be and shown by the record in this case. At folio 8, the witness Turner says: "I saw scows loaded with brick away above, "to the west of these premises, above Sixteenth "street."

In *Packer* vs. *Bird* (11 Supreme Ct. Rep. 210), Mr. Justice FIELD, speaking four the Court, says: "It is undoubtedly the rule of the common law "that the title of owners of land bordering on "rivers above the ebb and flow of the tide extends "to the middle of the stream, but that, where the "waters of the river are affected by the tides, the "title of such owners is limited to ordinary high "water mark." * * * * *

"Those rivers are regarded as public navigable "rivers in law which are navigable in fact. And, "as said in the case of The Daniel Ball, 10 Wall, "557, 563: 'They are navigable in fact when they "are used, or are susceptible of being used, in "their ordinary condition, as highways for com-"merce, over which trade and travel are or may be

" conducted in the customary modes of trade and " travel on water.'" And, speaking of the meaning of the term "ordinary high-water mark," he says: "The terms has in law a technical meaning, " and applies to all streams, rivers, or arms of the " sea where the tide ebbs and flows."

The lands involved in this case, being below ordinary high-water mark, were not included in the grant to the pueblo or in the decree of confirmation of said grant; and, being lands on the sea shore, where the tide-waters of the Bay of San Francisco ebb and flow over them, they passed to the State upon its admission into the Union; and it was not within the jurisdiction of the executive officers of the Government to make a subsequent grant thereof, or, by including them within the survey of a prior grant, in which they were not originally included, to pass title thereto.

The very records of the Land Department, which the counsel in error have made part of their brief, show upon their face that the deputy surveyor, who made the survey upon which this patent is based, did not approve the same as having been made in accordance with law, for he says: "It is " my belief, based upon a close inspection of the " ground and investigation made, that this survey is " not in accordance with the decree of the United " States Circuit Court;" and that the survey never

was approved by the surveying department of the Government in the manner required by law.

Under the facts as shown by the record, and the law applicable to those facts, we respectfully submit that the judgment of the Supreme Court of the State of California should be affirmed.

CHAS. N. FOX,

Attorney for Defendants in Error.

(Knight *vs.* United Land Association. No. 824. To follow the first paragraph on page 88)

ADDENDA.

The grant to the Pueblo was not one by deed, but one resting on the Mexican law. It was not a perfect but an inchoate grant. It was not of an indefeasible estate. No assignment of the lands had ever been made by the former government. The claim was one which required the recognition and action of the new government.

Grisar vs. *McDowell*, 6 Wall., 373.

"Ownership in the lands could not be strictly affirmed. "It amounted, in truth, to little more than a restricted and "qualified right to alienate portions of the land to its in- "habitants for building or cultivation and to use the re- "mainder for commons, for pasture lands, or as a source of "revenue, or for other public purposes. *This right of dispo- "sition and use was in all particulars subject to the control of "the government of the country.*"

Townsend vs. *Greely*, 5 Wall., 336.

But under the laws of Spain or Mexico there was never even an inchoate grant or claim to lands below ordinary high-water mark, and none was ever asserted on the part of the petitioners for confirmation of the claim.

"The dominion and property in navigable waters *and in "the lands under them* being held by the king as a public "trust, the grant to an individual of an exclusive fishery in "any portion of it is so much taken from the common fund "entrusted to his care for the common benefit. In such "cases whatever does not pass by the grant still remains in "the crown. Grants of that description are therefore con- "strued strictly, and it will not be presumed that he intended "to part from any portion of the public domain unless clear "and special words are used to denote it."

Martin vs. *Waddell*, 16 Peters, 411.

There having existed at the date of the conquest or treaty no claim to these lands founded upon any "private land grant" or upon any law of Spain or Mexico, they became immediately subject, without restriction or reservation, to the Constitution and laws of the United States. Under that Constitution and those laws the title to the shore of the sea and the arms of the sea *and the soils under tide waters* passed, not to the United States, but to the State.

Weber *vs.* Harbor Commissioners, 18 Wall., 65.

"When the revolution took place the people of each State "became themselves sovereign, and *in that character held the* "*absolute right* to all their navigable waters, *and the soils* "*under them*, for their own common use, subject only to the "rights since surrendered by the Constitution to the Gen- "eral Government."

Martin vs. *Waddell*, *supra*.

This ownership is "subject only to the paramount right "of navigation over the waters so far as such navigation "might be required by the necessities of commerce with "foreign nations or among the States, the regulation of "which was vested in the General Government."

Weber vs. *Harbor Commissioners*, *supra*.

This right of navigation was surrendered by section 8 of article I of the Constitution, as to "the regulation of commerce," but all else was reserved by article X of the same instrument.

In *Martin* vs. *Waddell* this question was considered with reference to the tide lands of New Jersey, one of the original States; but later, in *Pollard's Lessees* vs. *Hagan* (3 How., 212), the exact question here involved came squarely before this court. The action, as here, was ejectment. The lands in controversy were of the lands derived from Spain, lying below ordinary high-water mark at Mobile, Alabama, a territory which, like California, came under the jurisdiction of the United States unclothed with the mantle of statehood. The plaintiffs claimed, as plaintiff in error here claims,

under a patent from the United States and an act of Congress confirming to them the premises. The defendant contested the validity of the patent and of the confirmatory act of Congress for want of jurisdiction and power over the lands. Judgment went for defendant, and in affirming it this court held that even if it were true that the King of Spain had the right to grant to a subject the soil under the navigable waters, it did not follow that the United States received the land with the same right, and said:

"It cannot be admitted that the King of Spain could, by "treaty or otherwise, impart to the United States any of his "royal prerogatives; and much less can it be admitted that "they have capacity to receive or power to exercise them. "Every nation acquiring territory by treaty or otherwise "must hold it *subject to the constitution and laws of its own "government* and not according to those of the government "ceding it." (Pages 225 and 226.) * * * * * * * * "The shores of navigable waters *and the soils under them* "were not granted by the Constitution to the United States, "but were reserved to the States respectively. The new "States have the same rights, sovereignty, and jurisdiction "on this subject as the original States. The right of the "United States to the public lands and the power of Con-"gress to make all needful rules and regulations for the sale "and disposition thereof conferred no power to grant to the "plaintiffs the land in controversy in this case." (P. 230.)

In the still later case of *Goodlittle et al.* vs. *Kibbe* (9 How., 471) the claim was founded upon an inchoate Spanish grant, dated December 12, 1809; an act of Congress confirming the same, passed July 2, 1866, and a patent from the United States, dated March 13, 1837, Alabama having been admitted into the Union in 1819. It will thus be seen that the case had in it the element of a preceding Spanish grant, which this has not, so far as these lands are concerned. The court, after reviewing the case of *Pollard* vs. *Hagan*, says:

"Upon a review of the case we see no reason for doubting "its correctness, and are entirely satisfied with the judgment "therein pronounced. * * * Undoubtedly Congress "might have granted this land to the patentee or confirmed

"his Spanish grant *before Alabama became a State.* But this "was not done, and the existence of this imperfect and in- "operative Spanish grant could not enlarge the power of the "United States over the place in question *after Alabama had* "*become a State,* nor authorize the General Government to "grant or confirm a title to land where the sovereignty and "dominion over it have become vested in the State."

The lands here in dispute were not included in the original grant; they passed to the new sovereign uncharged with any claim of private or municipal ownership whatever. California was admitted into the Union September 9, 1850. No proceedings to secure confirmation of the claim upon which this patent was issued were instituted until July 2, 1852; no confirmation had until May 18, 1865, and no patent issued until June 20, 1884. This patent was the first act of any government attempting to make a grant of these lands, and it was made thirty-four and a half years after "sovereignty and dominion over it had passed to and be- "come vested in the State" of California. It was therefore ineffectual for the purpose of vesting title in the patentee.

We therefore submit that—

1. Under the Constitution of the United States Congress had no power to grant and the executive officers of the Government had no jurisdiction to convey the lands in question or to include them in the patent properly issued for other lands.

2. That, so far as the patent includes lands lying below ordinary high-water mark, it is ineffectual and void.

3. That as to such lands it may be attacked in an action of ejectment.

CHAS. N. FOX,
Attorney for Defendants in Error.

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TIDE LANDS IN THE PUEBLO

OF SAN FRANCISCO, CAL.

Supreme Court of California.

OPINIONS

IN THE CASE OF

United Land Association et al.,

VS.

Thomas Knight.

Rendered January 2d and September 4th, 1890.

NOTE.—This case having been three times argued in the Supreme Court, and their opinions being important and not immediately accessible to the profession, have been printed for its convenience.

In the Supreme Court

OF THE

STATE OF CALIFORNIA.

IN BANK.

OPINION FILED JANUARY 2, 1890.

UNITED LAND ASSOCIATION ET AL., *Respondents*,

vs.

THOMAS KNIGHT, *Appellant*. No. 12,748

PUBLIC LANDS—PATENTS—AUTHORITY OF LAND OFFICE.

ADMISSIBILITY OF EVIDENCE.

1. Act Cong. 1864, § 7 (13 U. S. St. at Large, 334), provides that "it shall be the duty of the Surveyor-General of California, in making surveys of private land claims finally confirmed, to follow the decree of confirmation as closely as practicable, whenever such decree designates the specific boundaries of the claim; but when such decree designates only the outboundaries within which the quantity confirmed is to be taken, the location shall be made as near as practicable in one tract, and in a compact form, * * * and it shall be the duty of the Commissioner of the General Land Office to require a substantial compliance with the directions of this section before approving any plat and survey forwarded to him." Act Cong. 1851, § 13 (9 U. S. St. at Large, 631), provides that "the patent shall issue to the claimant on his presenting to the General Land Office an authentic certificate of confirmation, and a plot or survey

of said land duly certified and approved by the Surveyor-General, whose duty it shall be to cause all private land claims which shall be finally confirmed to be accurately surveyed, and furnish plots of the same." The decree confirming defendant's land claim described the land as "a tract situated within the County of San Francisco, and embracing so much of the extreme upper portion of the peninsula above ordinary high-water mark, * * * on which the city of San Francisco is situated, as will contain an area of four square leagues. Said tract being bounded on the north and east by the Bay of San Francisco, on the west by the Pacific Ocean, and on the south by a due east and west line drawn so as to include the area aforesaid." The survey made under this decree included by metes and bounds land below the line of ordinary high tide. The patent following the survey described the lands by metes and bounds, but recited the decree of confirmation. *Held*, in ejectment for the lands below high tide, that the north, east and west boundary lines given in the decree and recited in the patent would prevail over those given in the survey and the granting clause of the patent, as there was no power by which land could be included in the survey and patent, the claim to which had not been confirmed by the decree. McFarland, J., dissenting.

2. Plaintiff, to make his *prima facie case*, had the right to prove by surveys and maps, accompanied by parol evidence, that the premises were below the line of high tide, at the date of the conquest.

3. This evidence is not overcome by a patent read by defendant which includes the premises, if the patent shows upon its face that by reason of the specific boundary also given in the patent, the officer making it had no power over land below high tide.

4. The officer had no power to act upon land not confirmed to the Mexican grantee; nor can he by issuing a patent conclusively adjudicate upon his power over such land.

5. The evidence of plaintiff was admissible and upon all the evidence the judgment is affirmed.

Appeal from Superior Court, City and County of San Francisco; James G. Maguire, Judge.

Ejectment by the United Land Association and others against Knight. Judgment for plaintiffs, and defendant appeals.

E. F. Preston and James A. Waymire, for appellant. Philip G. Galpin, for respondents.

BY THE COURT. IN BANK. PATERSON, J.

This is an action of ejectment to recover a block of land lying below ordinary high tide in the City and County of San Francisco, and being a portion of that part of San Francisco known as "Mission Creek lands." The defendant claims under a patent of

the United States to the city, issued June 20, 1884, in satisfaction of a pueblo grant of four square leagues, which was confirmed, by the decree of the United States Circuit Court, May 18, 1865. The tract confirmed by this decree is described as "a tract "situated within the County of San Francisco, "and embracing so much of the extreme upper portion "of the peninsula above ordinary high-water mark (as "the same existed at the date of the conquest of the "country, viz., 7th of July, 1846), on which the city of "San Francisco is situated, as will contain an area of "four square leagues; said tract being bounded on the "north and east by the Bay of San Francisco, on the "west by the Pacific Ocean, and on the south by a due "east and west line drawn so as to include the area "aforesaid," subject, however, to certain deductions for lands previously reserved or dedicated to public use by the United States. Under the decree referred to a survey was made, and on August 13, 1868, was approved by the United States Surveyor-General for the State of California, which fixed the southern boundary of the land by following the high-water mark, thus excluding the lands of Mission Creek, of which the land in suit is a part. Subsequently, in 1884, the Secretary of the Interior caused another survey to be made, one line of which ran directly across the mouth of Mission Creek, thus including the lands of Mission Creek as a part of the grant to the city. The patent to the city recites the decree confirming the grant. Plaintiffs' claim of title is based upon a deed from the Tide Land Commissioner to Ellis, dated November 24, 1875, and subsequent conveyances to them. They contend that the State, upon its admission into the Uuion, by virtue of its sovereignty, became seized of the land, it being tide land. This

right of the State, they claim, is recognized by the decree confirming the grant to the city. It is claimed that the patent is bound to follow the decree in fixing the boundary at high-water mark, and that so much of the patent as attempts to convey lands below high-water mark is void, because in excess of the authority of the officials issuing the patent.

Appellant contends that a party in an ejectment suit cannot question the validity of a United States patent for land upon the ground that it does not follow the decree confirming the grant; that the patent from the United States Government to the City and County of San Francisco for the pueblo lands confirmed to it under the Acts of Congress of March 3, 1851, and of July 1, 1864, by the decree of the United States Circuit Court, which patent conforms in its description of the lands granted to the final survey, made as provided in the latter act in accordance with the instructions of the Commissioner of the General Land Office, is conclusive evidence, as against the State of California and its grantees, of the right of the city and county to all the land embraced within the exterior limits of the survey, including tide lands lying below the line of ordinary high tide. It is said that the question is no longer an open one in this State. The case of the *People* vs. *City and County of San Francisco*, 75 Cal., 388, 17 Pac. Rep., 522, is cited and relied on in support of this contention. It did not appear in *People* vs. *City*, etc., whether the decree of confirmation was made a part of the patent. In this case it is shown that the patent contains full recitals of the decree, and shows upon its face that the tract confirmed embraced "so much of the "extreme upper portion of the peninsula above ordinary "high-water mark (as the same existed at the date of

" the conquest of the country, viz., 7th of July, 1846), " on which the city of San Francisco is situated, as will " contain an area of four square leagues," etc. It shows that three sides of the tract are bounded by natural monuments, namely, " on the north and east by the " Bay of San Francisco, on the west by the Pacific " Ocean, and on the south by a due east and west line " drawn so as to include the area aforesaid." If it be conceded, however, that the decision referred to covers the questions involved as fully as is claimed by the appellant, we feel satisfied that the Supreme Court of the United States would not follow it in this case or any other, involving the same questions, which might go to that Court on a writ of error. " It has always been the " practice here to adopt that view of a legal question " which has been taken by the Supreme Court of the " United States, when the question is within the branch " of the jurisdiction of that Court which may be exer- " cised by writ of error to this Court." As the question is a Federal question, it is one which will be decided ultimately by the Supreme Court of the United States. *Belcher* vs. *Chambers*, 53 Cal., 635.

The question involved in this case is whether the officers of the Land Department had power to patent land outside of the natural boundaries given in the decree of confirmation. If the Land Department had no jurisdiction to act, if any portion of the land described in the patent was not a part of the public domain, or if there was no legislation authorizing its conveyance by the Land Department, then, under the decisions of the United States Supreme Court in *Doolan* vs. *Carr*, 125 U. S., 618, 8 Sup. Ct. Rep., 1228, and other cases therein cited, the patent is inoperative to pass the title; and objection can be taken to it on these grounds at any time, and in any form of action.

Upon her admission into the Union, the State of California became the owner, by virtue of her sovereignty, of all the tide-water lands within her borders lying below high-water mark, except such as had been disposed of by the Mexican Government prior to the treaty of Guadalupe Hidalgo. The territory acquired from Mexico was by the express terms of that treaty taken by the United States subject to the trust of protecting all legal and equitable interests of prior grantees under the former sovereign. The State, of course, could not take more than the United States received; and the claim of the State, by virtue of her admission and her sovereignty, was subordinate to such prior equities, and subject to the power of the Federal Government to confirm prior Mexican grants, and to locate grants of specific quantities of land within the exterior boundaries of larger tracts. (*Lux* vs. *Haggin*, 69 Cal., 255, 10 Pac. Rep., 674.) The United States Government has exercised the power vested in it, and has through its courts and the officers of its land department, attempted to define the boundaries of the four leagues of land to which the City of San Francisco, as successor in interest of the pueblo of San Francisco, a Mexican citizen, was entitled. The court, having jurisdiction to hear and determine the right of this claimant, finally confirmed its claim to four square leagues of land in the extreme end of the peninsula, giving, as the boundaries thereof on the west, the north, and the east, the natural lines of high-water mark, leaving the southern boundary to be fixed by the surveyor on such a line as would include, between it and the high-water lines north of it, said four square leagues of land. This, it seems, the surveyor did not do; but, ignoring the natural boundaries fixed by the court in its decree for the west, north and east, ran his line below

the line of high tide, and across the mouth of Mission Creek, and included within his description the lands described in the complaint—lands of the State not included within the decree of confirmation. Following the survey, the patent describes the land by metes and bounds.

The Government of the United States is in duty bound to carry into effect the stipulations contained in the treaty of Guadalupe Hidalgo; but the power to do so must be exercised in the manner provided by Congress; and it would seem that when Congress vested in the Federal courts the power to determine the rights of Mexican claimants, and provided (section 7) that in making the survey the Surveyor General should "follow " the decree of confirmation as closely as practicable, " whenever such decree designates the specific bound- " aries," and that " it shall be the duty of the Commis- " sioner of the General Land Office to require a sub- " stantial compliance with the directions of the section " before approving any survey and plat forwarded to " him," that the officers of the land department are, as to such lands, merely auxiliary to the court, with special and limited jurisdiction to carry out its decrees. Section 13 of the Act of 1851 (9 U. S. St., 631) provides that " the patent shall issue to the claimant upon his " presenting to the General Land Office an authentic " certificate of confirmation, and a plat or survey of said " land, duly certified and approved by the Surveyor " General, whose duty it shall be to cause all private " land claims which shall be finally confirmed to be ac- " curately surveyed, and to furnish plats of the same; " and in the location of said claims the said Surveyor " General shall have the same power and authority as " are conferred on the Register of the Land Office by

"section 6 of the Act, to create the office of Surveyor of "the public lands of the State of Louisiana, ap- "proved March 3, 1831." Under this provision, we think it clear that the power of the Surveyor-General is restricted to the claim as finally confirmed. It has been decided in several cases, on appeal from decrees of confirmation, that the description must be followed; that "the decree is a finality, not only on the question of title, but as to the boundaries which it specifies." (*United States* vs. *Halleck*, 1 Wall., 455; the Fossat Case, 2 Wall., 649; *Higueras* vs. *United States*, 5 Wall., 829, *Van Reynegan* vs. *Bolton*, 95 U. S., 35.) In *Higueras* vs. *United States*, the Court declared that "confirmation must precede the survey which is made "subject to such an order; and, if the decree of con- "firmation is so indefinite and incongruous that it can- "not be executed, then it is void, and of no effect, and "the claim to the land stands upon the same footing, in "legal contemplation, as a claim which was never pre- "sented to the commissioners for adjudication." In the Fossat Case the Court held that it was not competent for the District Court to depart from its own decree in the exercise of the power conferred by the Act of June 14, 1860; that the Court was bound to execute the decree by fixing the lines of the grant in conformity with the provisions of the decree, the decree being not only the foundation of the validity of the grant, but of the proceedings in the survey and location of the land confirmed. In that case, as in this, the decree provided for specific boundaries on three sides of the tract, and left one side to be surveyed. If the Court, which then had the power to supervise and confirm or reject the survey, as the land department now does, could not alter or depart from the specific boundaries given in its own decree, how can the officers of the land department?

These cases, to be sure, were direct appeals to the Supreme Court of the United States; but they bear directly upon the question of the authority of the officers of the land department to patent lands outside of the boundaries of the decree of confirmation, and that is the question here. If the land granted is not within the power of the officer, the grant or patent is invalid. In *Polk* vs. *Wendal*, 9 Cranch, 87, Chief Justice Marshall said: "There are cases in which a grant is absolutely "void, as where the State had no title to the thing "granted, or where the officer had no authority to issue "the grant." In *New Orleans* vs. *United States* 10 Pet., 662–731, the Court said: "It would be a dangerous doc- "trine to consider the issuing of a grant as conclusive "evidence of right in the power which issued it. On its "face, it is conclusive, and cannot be controverted; but "if the thing granted was not in the grantor no right "passes to the grantee." So in this case, unless Congress has given the land department power to dispose of land belonging to the State of California—lands lying outside of the boundaries of the decree—a patent to land shown to be outside of such decree is invalid. In *Wright* vs. *Roseberry*, 121 U. S., 488, 7 Sup. Ct. Rep., 985, it appeared that land which had been previously granted to the State by the Swamp Land Act was held by the defendant under a patent from the United States issued on a pre-emption claim. The Court held the patent to be invalid as a conveyance, because the land was not, at the time it was patented to the defendant, within the granting power of the Land Office. The State of California took the lands in controversy, in 1850, as effectually as if she had received them by grant from Congress. If the land department had the power to determine that land outside of the de-

cree of confirmation should be conveyed, it would necessarily have the power to pass on its own right to convey the land, but the decree of confirmation was the foundation of the power to make the patent. It precedes and limits the power of the officers of the land department. If the latter are not limited by the decree, then the Court may confirm a tract in one place, and the officers locate it in another, and the patent which attempts to convey the latter tract controls the former. This cannot be, for the whole power of deciding what shall be granted in pursuance of the treaty is intrusted to the judicial department. Section 7 of the Act of 1864 (13 U. S. St., p. 334), shows that the power of the land department is limited by the provisions of the decree: "It shall be the "duty of the Surveyor-General of California, in making "surveys of private land claims finally confirmed, to "follow the decree of confirmation as closely as practi-"cable whenever such decree designates the specific "boundaries of the claim; but, when such decree desig-"nates only the out-boundaries within which the "quantity confirmed is to be taken, the location shall "be made, as near as practicable, in one tract, and in a "compact form, * * * and it shall be the duty of "the Commissioner of the General Land Office to re-"quire a substantial compliance with the directions of "this section before approving any survey and plat for-"warded to him." Here is an emphatic declaration by Congress that the decree is the limit of the power of the land department, and shows very clearly, we think, that Congress has not given to the officers of the land department the exclusive and final power of determining whether any land is within or without the location of the decree, or of locating grants in places where the courts have not located them. If such power is not con-

ferred upon the land department, any attempt to convey land outside of the permanent boundaries named in the decree is not an error of judgment simply, but is an Act void for want of jurisdiction.

Under the laws of Mexico existing at the time of the treaty, lands below and within 200 *varas* of the seashore could not be held in private ownership (Wheeler, Land Titles, 13); and the land officers of the United States could not, in the absence of a judicial adjudication that such land belonged to a Mexican claimant, convey to him. "All that place is called 'sea-beach' which is covered by the waters of the sea when at its highest point during all the year." (Hall Mex. Law, 448.) The king could not alienate such lands. (*New Orleans* vs. *United States*, 10 Pet., 726; *Milne* vs. *Girodeau*, 12 La., 324.) The shore of the sea is that part of the land covered by water in its greatest ordinary flux, the ports, bays, road-steads and gulfs, and the rivers, although they may not be navigable (Mission Creek is navigable), their beds, mouths, and the salt marshes. (Hall, Mex. Law, 448–503; Civil Code Mex., Art. 802.)

A patent cannot be issued by the land department to a person not named in the decree, because the courts, and not the department, are given the power to determine the persons to whom the lands were granted by Mexico. If the judgment of the Court should decree that the grant is a forgery, and therefore void, and the land department should patent the land claimed, the action of the department would be shown to be void upon the production of the decree, because Congress has given to the courts jurisdiction to determine the validity or invalidity of the claim. Of course, in cases where the Court, by its decree, has established the validity of the grant, and a tract of a certain number of acres has

been confirmed to be located within the exterior limits of a larger tract, it is left to the officers of the land department, in their discretion, to locate and survey the requisite number of acres within the larger tract; and their action in execution of the decree is not subject to attack in any collateral proceedings, because it is within their jurisdiction, and in pursuance of the decree. In such cases there cannot possibly be any conflict between their action and the directions of the decree. It is auxiliary to the decree, and as conclusive as the decree itself. Unless we bear in mind the distinction between cases of this kind—the confirmation of a certain number of acres to be located within the exterior boundaries of a larger tract, and designated by the Supreme Court of the United States as "floats"—and cases in which the boundaries, or some of them, are definitely fixed by the decree, the decisions upon the subject will appear to be very conflicting. An examination of the authorities cited at the argument of this case and the argument of *People* vs. *City and County of San Francisco*, with this distinction in view, will illustrate the principle stated, and explain what would otherwise seem to be a conflict of decisions on the subject. In *Moore* vs. *Wilkinson*, 13 Cal., 478, relied on by parties claiming under the patent from the United States, the Court regarded the grant "as conveying an interest to four leagues lying within a larger tract." (Page 486.)

It is true the patents, in some cases, seem to have gone beyond the boundaries of the *deseño*, and yet they were held not to be void; but it was so held in each case because the parties attacking the patent had no title to land lying outside of the exterior boundaries, and were not, therefore, in a position to attack the validity of the patent. In *Doolan* vs. *Carr*, the Court

held (only Waite, C. J., dissenting), that one who had not even connected himself with the paramount source of title might question the validity of the patent; 125 U. S., 618, 8 Sup. Ct. Rep., 1228. In *Ward* vs. *Mulford*, 32 Cal., 369, the district Court, as it had the right to do under the law then applicable to its decrees, had reviewed the survey, and confirmed it. Even if its action were irregular, it was not void. But at the time the grant before us in this case was confirmed the surveyor was not required to report his action to the Court for confirmation, and no report was made.

In *Chipley* vs. *Farris*, 45 Cal., 539, the patent covered only a portion of the tract described in the decree, but not the land in controversy. Plaintiff had no legal title, because no patent had been issued to him under the decree. The question as to the power of the land department to patent lands outside of the boundaries of the decree was not involved. Within the boundaries of the decree it may act. Without the boundaries it has no jurisdiction. Furthermore, in that case the descriptions were both by metes and bounds, and it is expressly admitted by respondent in that case, in his written points, that if the side lines of the tract in controversy were the seashore a different rule would apply. In *Teschemacher* vs. *Thompson*, 18 Cal., 11, the Court assumed that the grant was of "a specific quantity lying in an area of larger extent;" page 24. In *Cassidy* vs. *Carr*, 48 Cal., 339, there was no conflict between the decree and the patent. The survey and patent, as the Court said, simply carried out the decree, and were conclusive between the parties. Of course, where "the survey and patent but carry out the decree" the patent is conclusive between the parties. In none of the cases cited is the question of the power of the officer to issue

a patent for land not embraced in the decree considered. It does not follow logically that because the patent is conclusive in all cases where the land department had jurisdiction, it is conclusive as to all lands lying without the boundaries of the decree, as well as within them. The surveyor cannot incorporate into the decree lands not confirmed, nor can he shift on the surface of the earth the natural boundaries — mountains, bays, or oceans. The presumption always is, doubtless, that the metes and bounds follow the decree; but to hold that the positions of the natural monuments are indisputably fixed by the courses and distances of the surveyor, and approval of the land-officers, would be placing a construction upon the acts of Congress never intended by that body, and not warranted by the decisions of the national courts. The land department has power to do what the Court cannot do, viz., locate, survey, and patent tracts of land designated by the Court within larger areas; and when a ranchó is confirmed by name to fix its boundaries, but when the Court itself, in its decree, fixes one or more of the boundary lines, the department has no jurisdiction to go beyond it. The distinction between the different kinds of grants is clearly and fully stated in *United States* vs. *McLaughlin*, 127 U. S., 428, 8 Sup. Ct. Rep., 1177, and in *United States* vs. *Curtner*, 38 Fed. Rep. 1. In *Doolan* vs. *Carr*, *supra*, the Court said: "There is no question as to the principle that, where "the officers of the Government have issued a patent, "in due form of law, which on its face is sufficient to "convey the title to the land described in it, such patent "is to be treated as valid in actions at law, as distinguished "from suits in equity, subject, however, at all times, to "the inquiry whether such officers had the lawful authori-"ty to make a conveyance of the title. But if those

"officers acted without authority; if the land which "they purported to convey had never been within their "control, or had been withdrawn from that control at "the time they undertook to exercise such authority— "then their act was void—void for want of power in "them to act on the subject-matter of the patent, not "merely voidable. In which latter case, if the circum- "stances justified such a decree, a direct proceeding, "with proper averments and evidence, would be re- "quired to establish that it was voidable, and should "therefore be avoided. The distinction is a manifest "one, although the circumstances that enter into it are "not always easily defined. It is, nevertheless, a clear "distinction, established by law, and it has been often "asserted in this Court that even a patent from the "Government of the United States, issued with all the "forms of law, may be shown to be void by extrinsic "evidence, if it be such evidence as by its nature is "capable of showing a want of authority for its issue." Under this and other decisions, including many de-decisions of this Court, (*McLaughlin* vs. *Powell*, 50 Cal., 63; *McLaughlin* vs. *Heid*, 63 Cal., 208; *Railroad Co.* vs. *McCusker*, 67 Cal., 67, 7 Pac. Rep., 122; *Mining Co.* vs. *Oliver*, 75 Cal., 194, 16 Pac. Rep., 780, quoted approvingly in *Wright* vs. *Roseberry*, *supra*,) the evidence offered and admitted was competent, relevant, and material, and fully established the findings of the Court. The deeds to Ellis, and evidence of the location on the earth's surface of the line of high tide, were properly admitted.

Now, if it be true, as a matter of law, that the Surveyor General had no power to include in a survey any land, the claim to which was not confirmed by the decree of the Circuit Court, and that neither the Commis-

sioner of the Land Office nor the Secretary of the Interior had any power to direct or approve such a survey; the only question is, which of the west, north and east boundary lines, respectively shall prevail—those given in the decree, and recited in the patent, or those given in the survey, and employed in the granting clause of the patent? In determining this question, there is no violation of the principles which forbid a collateral attack upon such instruments. There is no such attack. It becomes simply a question of construction. Both descriptions are upon the face of the patent, and the case is one in which the plaintiffs claim that the defendant's title depends upon a deed describing the property by natural boundaries, and also by metes and bounds; that the description by metes and bounds includes land not included within the natural boundaries, and which defendant claims to own, but which is in fact owned by plaintiffs; that their title should be quieted because the natural and permanent boundary lines should prevail over the description by metes and bounds. A determination of this question will in no way affect the location of the south line. By the decree, the surveyor was to fix that line; but, if the surveyor had run his line through the bay of San Francisco, and taken in lands of the State lying below the high-water mark on the eastern shore of the bay, or lands lying in the foot-hills of the county of Contra Costa, would it be contended that the patent, although reciting the decree confirming four leagues on the peninsula of San Francisco, with the bay of San Francisco as the eastern line thereof, is conclusive evidence, as against the State or its grantees, of the right of the City and County of San Francisco "to "all the lands embraced within the exterior limits of "the survey, including tide land lying below the line

"of ordinary high tide," and in fact conclusive against everybody as to all lands included in the survey, wherever located? If the plaintiff, in the case supposed, would not be prevented from showing that the metes and bounds included land belonging to him, not confirmed by the decree, and which the land officers could not convey, why may he not show the same thing in this or any other kindred case? In *More* vs. *Massini*, 37 Cal., 432, the court said: "The call for the seashore as the "southern boundary must be regarded as the more de- "finite and certain, and will prevail over a call for a "mere station and over the courses and distances."

But, whether we consider it as a collateral attack, or a mere matter of construction, it is clear, we think, that, under the decisions of the Supreme Court of the United States in *Doolan* vs. *Carr*, *supra*, and other cases there cited, "want of power in an officer of the Land "Office to issue a land patent may be shown in an ac- "tion at law by extrinsic evidence, although the patent "has been issued with all the forms of law required for "a patent of public land." There were no errors in the rulings of the court. The evidence shows beyond doubt that the land in controversy is outside of the natural boundaries of the decree. The judgment is therefore affirmed.

PATERSON, J.

We concur:

WORKS, J.,
FOX, J.,
SHARPSTEIN, J.

THORNTON, J. I concur in the judgment, and will file an opinion hereafter.

I dissent: MCFARLAND, J.

Upon and after rehearing granted on petition of numerous members of the bar, and on the 4th of September, 1890, the following opinions were filed:

BY THE COURT. IN BANK. FOX, J.

This case was first heard and an opinion thereon filed in department. Subsequently a rehearing in bank was granted, and after argument a decision was filed January 2, 1890. This was followed by divers petitions for a second rehearing, representing that the case was one of great public importance, involving the validity of land titles to a very considerable and what is now a very valuable portion of the city of San Francisco, and in view of the alleged importance of the questions involved, a rehearing was granted. Upon this hearing elaborate oral arguments have been made, and all who desired have been permitted to file printed briefs and arguments, all of which have been carefully considered, and we are still constrained to adhere to the conclusion first reached in bank, and announced in the opinion written by Mr. Justice Paterson, 23 Pac. Rep., 267.

This is not, as assumed on behalf of appellant, a case of conflict between two parties, both claiming under the Government of the United States; nor is it a case where one is claiming under patent issued by the Government of the United States, and the other is a mere naked trespasser, failing to connect himself with any paramount source of title.

The defendant, and those who are situate like him, and on whose behalf argument is here made, claims under the Pueblo of San Francisco. That pueblo claimed, and derived its title, not under the Government of the United States, but under the Government of Mexico. Its grant was not a special one, made by the supreme

legislative authority of the sovereign State, but was one made by the ministerial officers of the Government, under, and necessarily in conformity with, its general laws. Necessarily so, for if the ministerial officers exceeded the authority conferred upon them by law, then their act was void. It must, therefore, be assumed that the grant was only such as the ministerial officers were authorized by law to make.

The patent of the United States, invoked by the appellant, is not an original grant; does not emanate from the source of title, but is a mere acknowledgment that the Pueblo had title from the Mexican Government—the predecessor of the United States—and a release of all claim on the part of the United States to the property found by its judicial tribunals to have been so vested in the Pueblo. The patent was not necessary to invest the Pueblo with title, for its title existed at the cession of the territory. It was recognized by the decree of final confirmation (cited in the former opinion), and as shown by that decree it was of a fixed and definite quantity of land, with its boundary on three sides fixed and established by the terms of the original grant, and marked by the hand of nature as limited by the shores of the sea. It required to be surveyed—for one purpose only—that of so fixing and establishing the boundary which was left undetermined by the original grant as to secure the given quantity, exclusive of that which was held by title paramount within the natural boundaries so fixed and the survey so made. The patent was only evidence of the pre-existing title.

Waterman vs. *Smith*, 13 Cal., 419.

The only purpose of a survey was that of establishing the one undetermined line, the southern line, of the

body of land to which the pre-existing title should attach.

In the case of this Pueblo, it undoubtedly became necessary, in order to secure quantity, to make a general survey of the whole, and also a survey of the several parcels within the exterior boundaries which were confessedly held by adverse claimants holding under paramount title; but this necessity and power existed only for the purpose of ascertaining and determining the one undetermined and uncertain boundary line—that on the south. The right to make that survey, and establish that boundary, belonged to the political department of the Government, and could not be exercised by the courts. But the court could ascertain and fix the position of the natural boundaries which were designated in the grant, and did do so. While the courts could not and cannot interfere with the action of the political department of the Government in fixing the one boundary which was left undetermined by the grant as finally confirmed, they must determine whether the prior rights of third parties have been interfered with by the survey and patent issued thereon. While the survey and patent are conclusive upon the courts in actions of ejectment, they are so only when not in conflict with the prior rights of third persons, and in such actions their inconclusiveness can be asserted to the extent essential for the protection of such prior rights.

Moore vs. *Wilkinson*, Id., 486.

The patent, so far as it is construed as a conveyance, is to be construed only as a quit claim, releasing to the patentee such interest as the United States possessed in the land conveyed by the original grant, and it takes effect by relation at the time when the proceedings were

originally instituted before the Board of Land Commissioners for the confirmation thereof; as a record of the Government, it is evidence that the claim asserted was valid under the laws of Mexico (*Yates* vs. *Smith*, 38 Cal., 71); but it is valid as such record only to the extent that it conforms to the decree of the judicial department of the Government in reference to those matters upon which the judicial department were empowered to decide; that is to say, the decree of confirmation, with reference to the fixed natural boundaries, and to the survey made by the political or ministerial department, establishing the only boundary which was not fixed and determined by the decree of confirmation. As a deed it can convey nothing which the Government had not the power to grant or confirm at the date of filing the petition for confirmation. (See *Doolan* vs. *Carr*, cited by Mr. Justice Paterson, and cases therein cited.) It certainly could convey nothing which was not at that time vested and never afterward became vested, in the United States. And this question may be inquired into upon collateral attack, in an action of ejectment.

In *Smelting Company* vs. *Kemp*, 104 U. S., 614, the Supreme Court of the United States, in passing upon this question of collateral attack upon a patent in an action of ejectment, says: "If they [the lands embraced in the patent] never were public property, or had previously been disposed of, or if Congress had made no provision for their sale, or had reserved them, the department would have no jurisdiction to transfer them, and its attempted conveyance of them would be inoperative and void, no matter with what seeming regularity the forms of law may have been observed. The action of the department would in that event be like that of any other special tribunal not having jurisdiction of a

case which he had assumed to decide. Matters of this kind, disclosing a want of jurisdiction, may be considered by a court of law. In such case the objection to the patent reaches beyond the action of the special tribunal, and goes to the *existence of a subject upon which it was competent to act*."

In the later case of *Wright* vs. *Roseberry*, 121 U. S., 519, the same court again considers the question, and not only quotes and approves the foregoing but also the following passage: "A patent may be collaterally impeached in *any* action, and its operation as a conveyance defeated, by showing that the department had no jurisdiction to dispose of the lands; that is, that the law did not provide for selling them, or that they had been reserved from sale, or dedicated to special purposes, or had been previously transferred to others. In establishing any of these particulars, the judgment of the department upon matters properly before it is not assailed, nor is the regularity of its proceedings called into question; *but its authority to act at all is denied, and shown never to have existed*."

And still later, in *Doolan* vs. *Carr* (125 U. S., 618), *supra*, the same Court again says, "A patent may be "collaterally impeached in any action, and its operation "as a conveyance defeated, by showing that the de- "partment had no jurisdiction to dispose of the lands, " * * * or that they had been previously trans- "ferred to others."

In view of these recent and oft-repeated decisions of the Court of last resort to which the question can be carried, there can no longer be a doubt about the right of the courts, even in actions of ejectment, when the parties present and rely, as in this case, upon a patent from the United States, to inquire as to whether or not

the description given in the patent includes land which the Government or its officers had no power to convey.

This being so, then, when the patent was offered in this case, the plaintiff had a right to challenge its validity, not perhaps as to everything that it purported to convey, but as a conveyance of a particular tract for the recovery of which the action is brought, on the ground that that tract was not embraced within the lands covered by the grant which the patent was intended to evidence, and was not land of which the Government or its officers had the power to make valid conveyance. Being so challenged, it is found and conceded that the land lies, not on or near the southern boundary of the four leagues for which the grant is confirmed—the only boundary which the ministerial officers of the Government were required, authorized or empowered to establish—but midway between the northern and southern extremities of said four leagues, and near to but outside of the eastern boundary thereof, as said boundary had been fixed and established by the laws of the nation making the grant, and found and confirmed by the judicial department of the Government in its decree of confirmation.

Was it outside of that boundary? It is *found* and at the argument *admitted* to be below *ordinary high-water mark*, in a navigable arm of the Bay of San Francisco. If so, it was outside the boundary line of the grant, under the laws of the country by which the grant was made. Under the laws of that country, these lands below ordinary high-water mark constituted the beach, or sea shore, and "with respect to the ownership, it "pertains to the nation which is mistress of the country "of which it forms a part, and with respect to use, to "all men." (Leyes 3, p. 6, tit. 28, part 3.) The king

could not alienate such lands. (See *New Orleans* vs. *United States*, 10 Peters, 726, and other authorities cited by Mr. Justice Paterson.) That the Government did not alienate them is established by the decree of confirmation quoted in the former opinion, by which decree it is expressly declared that the lands so granted, and of which confirmation is decreed, are bounded on the "north and east by the Bay of San Francisco, and on "the west by the Pacific Ocean." That the ministerial officers of the Government were bound by the description given in that decree, so far as the decree did give definitive boundaries, and had no right to include in the patent lands outside of such boundaries, is abundantly established by the authorities cited by Justice Paterson in his opinion.

Again, the land in dispute was not land which the Government had the power to grant at the date of the filing of the petition for confirmation. Not having been granted by the Mexican Government before the conquest, it remained the property of the sovereign. The petition for confirmation was not filed until long after the admission of California into the Union. Immediately upon such admission, the State by virtue of her sovereignty became seized of the land, the same being tide land of the Bay of San Francisco. The land did not, therefore, belong to the United States, and even Congress had no power to grant it to another. *Quoad* this land, the patent is absolutely void, for the reason given in *Lessee* vs. *Wendell* (9 Cranch, 87), cited on behalf of appellant; the Government in whose behalf the patent was issued had no title to the thing granted.

It is claimed on behalf of appellant that the doctrine of *stare decisis* should be applied to this case, and that when so applied, the question here involved is *res*

adjudicata, under the decision of this Court in *People* vs. *San Francisco* (75 Cal., 389). We do not think so. That case was decided on demurrer to a complaint which admitted on its face that the patent was in "due form of law," was based upon a survey certified to have been made in strict conformity with instructions of the Commissioner of the General Land Office, which instructions had been given under the directions of the Secretary of the Interior; was issued under the great seal of the United States, and purported by virtue of the authority of said decree of confirmation, and in pursuance thereof, to grant and convey to the City of San Francisco the land embraced and described in the plat and survey, and including the premises within the exterior boundaries thereof. (See page 393.) The decree itself is also copied in full into the opinion (see page 392), but did not there, as here, appear to have been a portion of the patent. It shows upon its face that the grant as confirmed was bounded on the east by a natural boundary, to wit: *ordinary high-water mark* of the Bay of San Francisco (as the same existed at the date of the conquest of the country, namely, the 7th of July, 1846). This decree has been accepted and become final, and settles the question for this and all other courts, and for all other officers and tribunals, as to what was included in the grant, so far as this eastern boundary was concerned. But the Court on demurrer was bound to take as true the allegation of the complaint, that the survey was made and patent issued "by virtue of the authority of said decree, and in pursuance thereof," and that it did "grant and convey to the City of San Francisco the tract of land" embraced and described in said plat and survey, and "including the premises within the exterior boundaries thereof." Tak-

ing these allegations to be true, the bill being *quia timet*, affirmance of the judgment which had been rendered for defendant on the demurrer necessarily followed.

But it is insisted that the case did not go off upon the proposition that these allegations must be taken as true, but the Court considered and determined the broad question of the conclusiveness of the patent, as the same is here and now presented. This seems to have been the course pursued by the Court, and it furnishes the strongest possible argument for refusing to accept the opinion then given as conclusive of the case at bar, for it was one not necessary to the decision of the case.

But disregarding that point, the Court was not then convincing in its reasoning or happy in its selection of authorities in support thereof. Neither of the three recent decisions of the Supreme Court of the United States cited above, and referred to in the opinion of Mr. Justice Paterson, were cited by counsel or referred to by the Court. It is hardly possible that the conclusion of the Court in *People* vs. *San Francisco*, as to the conclusiveness of the patent as a conveyance of land below ordinary high water mark, could have ever been reached if the attention of the Court had been called to the cases of *Smelting Company* vs. *Kemp*, *Wright* vs. *Roseberry*, and *Doolan* vs. *Carr*, *supra*. In fact, the two later cases were decided after the briefs were filed in *People* vs. *San Francisco*.

One of the cases upon which the Court rests its conclusion in *People* vs. *San Francisco*, is that of *Cassidy* vs. *Carr*, 48 Cal., 339. In that case the claimant held under a Mexican grant, held to be a perfect grant. It was confirmed to the extent of two leagues, and no more, although he claimed to have received juridical possession

of a larger quantity. He took no appeal. In due time his two leagues were surveyed off, the survey approved, and patent issued. He accepted the patent, and then the question in the action was whether he could still claim title to lands not included within the survey given in the patent, but claimed to have been included within the limits of his original juridical possession. The Court held that having accepted the patent, he was estopped from claiming lands outside the boundaries of the description therein given. The question was so different from the one here involved that we are unable to see how the decision constitutes any authority upon this question whatever.

In *Moore* vs. *Wilkinson*, 13 Cal., 487, another of the cases relied upon in support of that opinion, the grant was for merely four square leagues, but within a tract almost without limit as to extent or a western boundary, and the order was that "the Judge who may give pos-"session will cause the same to be measured according "to the ordinance, leaving the remainder, which may "result to the nation for its proper uses." Upon confirmation, approved survey and patent, the same being for four leagues and no more, the question was whether persons without title, but claiming to have settled within the exterior boundaries of the tract from which the four leagues was to be taken prior to the confirmation and survey, and to have filed declaratory statements as preemptors, could attack the patent on the ground that the patented lines did not conform to the juridical possession. The Court held that in such a case they could not; that the patent was conclusive of the validity of the grant, of its confirmation, of the survey and its conformity with the confirmation, and of the relinquishment to the patentee of all the interest of the United

States in the land patented. It could hardly have held otherwise, for the survey was within the natural exterior boundaries named in the grant, of which, as in this case, natural exterior boundaries were given on three sides, and within those natural exterior boundaries no valid pre-emption claim could be made until survey and segregation of the grant. But the case is in no sense parallel to the one at bar, or the one in support of which it is cited.

Chipley vs. *Farris*, 45 Cal., 539, is another of the cases cited in support of that decision. It, like that of *Cassidy* vs. *Carr*, was a case where the grantee, having received and accepted his patent, was seeking to claim lands excluded from the patent. It was not authority for the case in which it was cited, and is not in this.

Teschmatcher vs. *Thompson*, 18 Cal., 11, is also cited and relied upon as authority to the conclusiveness of the patent, and also that the Mexican Government had power and authority to make grants of these lands. As we read that case, it does not support either of these propositions. The lands in controversy there were not within the boundaries of or near any pueblo or other probable seat of commerce; the great body of the land in controversy was not below ordinary high-water mark, but salt marsh—lands above ordinary and below extraordinary high-water mark. Incidentally, it was claimed, and the Supreme Court held that in that case the boundary of the Mexican grant ran to ordinary low-water mark, and that the seashore having been granted by the Mexican Government at that point, the State took in subordination to the grant, and that her rights were postponed to and must abide the event of the action of the general Government in the settlement of that private land grant, and that the patent was conclusive of the

fact that the land had so been granted by the former Government. In that case, also, the survey was one approved by the Judicial Department of the Government. Here the Government, through its Judicial Department, has determined that the lands below ordinary high-water mark were *not* included in the grant, and directed that the survey be made accordingly. Not being so included, and the Court having so decreed, it follows that the rights of the State were not subordinate to, or postponed to the settlement of the grant to the pueblo.

The same may be said of *Ward* vs. *Melford* (32 Cal., 365), also cited in support of that decision. It was almost on all fours with *Teschmacher* vs. *Thompson*, and was decided on the authority of that case. In that case, as in the others, both the grant and and the survey thereof had been confirmed by the Judicial Department of the Government, and included the salt marsh. The Court properly held that where the Mexican Government had, before the conquest, granted those lands, the rights acquired by California by virtue of her sovereignty were subordinate to the grants so made. There is nothing in the conclusion reached now or on the former hearing of this case in bank in conflict with these authorities. The difference is found in the facts. There it was adjudged in and by the decree of confirmation that the lands in dispute had been granted by the Mexican Government before the conquest; here it has been adjudged and determined in and by the decree of confirmation that they had *not* been so granted. The adjudication in both cases is final.

The only remaining case cited in support of the opinion in *People* vs. *San Francisco*, is that of *Leese* vs. *Clark* (18 Cal., 574, and 20 Id., 425). All that was decided in that case bearing upon the case at bar, was that "the

"defendants, taking whatever interest they possess in "subordination to the future action of the Government "* * * in determining the location of the older "grant, are in no position to question these proceed-"ings;" and that "the term third person refers not to "all persons other than the United States and the "claimants, but to those holding independent titles "arising previous to the acquisition of the country." Both of these propositions may be accepted as true, but they do not militate against the view we have taken of this case. The plaintiffs in this case, it is true, do not claim by virtue of an older grant from the Mexican Government.

What they claim, is that the *locus in quo* was never granted, and under its laws could not have been granted, by the ministerial officers of the Government of Mexico; that this fact is established, not only by reference to the laws of Mexico, but also by the final adjudication of the courts of the United States in and by the decree of confirmation of the grant which was made; that not having been granted, it remained, at the date of the conquest the property of the nation, and passed as such to the United States; that the United States having made no grant thereof upon the admission of California into the Union, September 9th, 1850, it became the property of the State by virtue of her sovereignty, and the United States could not thereafter make a valid grant thereof. The State did not take in subordination to the older grant, and her rights were not postponed until the settlement of the rights of the older grantee, for there was no older grant in any manner affecting the property; none which included it even within its exterior boundaries. And on all the authorities this conclusion seems to be correct.

Teschmacher vs. *Thompson* and *Ward* vs. *Mulford* may be accepted as authority for the proposition that the Mexican Government could, and sometimes did make grants covering the salt marsh lying between the high lands and the seashore—the lands between the high-water mark of extraordinary tides at the full of the moon, or spring tides, and the ordinary high-water mark of the tides in their daily ebb and flow; and even sometimes extended the grant below ordinary high-water mark; but that fact does not prove that she could or ever did make grants of lands lying on the seashore, *below the ordinary high-water mark of the daily ebb and flow of the tides*, within the boundaries of a pueblo. In *People* vs. *San Francisco* the Court says: "No authority has "been cited in support of the statement that, by the "law of Mexico, tide lands could not be included within "pueblo lands." That may have been true, but the Court failed to mark the distinction between "tide lands" and "seashore;" between lands made productive by the occasional overflow of the tides and lands made barren by the regular and daily overflow thereof. Of the one it had before it two examples of the fact, established by decree of the Federal courts, that the Mexican Government could and sometimes did grant them; of the other no example has ever been furnished where the Government made such a grant. That it did not make a grant of such lands in this case is attested by the decree of confirmation. In support of the proposition that a pueblo could not own land below ordinary high-water mark, the Court was then cited to, and we again cite, Dwinelle's Colonial History of San Francisco, addend. 42; Wheeler's Land Titles of San Francisco, 13; Civ. Code of Mexico, art. 802; Domat, book 7, tit. 8, Sec. 1, Art, 1; Hall's Mexican Law, Sec. 1466; *New*

Orleans vs. *United States*, 10 Pet., 662; *Mayor* vs. *Maynow*, 1 Mart., 207; *Milne* vs. *Girodeau*, 12 La., 324.

There being no grant to which the rights of the State were subordinate, and to the settlement of which the rights of the State were postponed, she became vested with the title immediately upon her admission into the Union. Thereafter there was no power in the Government of the United States to make a grant of the land, and the act of its ministerial officers in including it within the survey and patent of a grant theretofore made was in excess of their jurisdiction, in violation of the decree of confirmation and void. The patent, so far as these lands were concerned, was in effect but the execution of the decree of confirmation. (*United States* vs. *Minor*, 114 U. S., 242.) "When a decree gives the "boundaries of a tract to which the claim is confirmed "with precision, and has become final, it is conclusive "not only on the question of title, but also as to the "boundaries which it specifies." (*United States* vs. *Hancock*, 133 U. S., 196.) And it was the duty of the surveyor in making survey of the claim finally confirmed to "follow the decree of confirmation as closely as prac-"ticable, whenever [and wherever] such decree desig-"nates the specific boundaries of the claim." (Id. and Sec. 7 of the Act of Congress of July 1, 1864—13 Stat., 334.)

Surely, if a ministerial officer, in executing a decree which fixes specific boundaries, includes land excluded by the decree from those boundaries, his act can have no force or validity as a conveyance, and especially so if the party executing the conveyance has no title.

As in *Jones* vs. *Martin* (13 Sawyer, 317), so here; the meander line down the coast was necessary for the purpose of ascertaining quantity, "but when done, it was

"the shore line as fixed by nature, and shown upon the "ground, and not the meander line as run by the sur- "veyor, that determined the boundary of the grant."

But there is still another aspect in which this case may be viewed. We have spoken of the rights of this pueblo as a pre-existing title.

That pre-existing title was never a fee, under the Mexican law. A grant to a pueblo was not "a private land grant" in the sense which took title out of the State. It was the mere vesting in the pueblo, a political subdivision of the State, of the *use* of the land in trust for the benefit of the inhabitants thereof, and with power, as the representative of the State, to make grants which should vest title in private ownership, of *solares*, or house lots, and *suertes*, or sowing lots, to settlers; the remainder to remain vacant, to the end that gifts thereof might be made to new settlers. These grants, as they are generally called, did not deprive the State itself at any subsequent period of making what are technically denominated "private land grants," vesting title in natural persons, of any portion of the lands lying within the four leagues of the pueblo which had not already passed into private ownership; and this power on the part of the State was not unfrequently used. It was notably so used in several instances within the pueblo of San Francisco, and the grants so made by the State within the pueblo have been recognized and confirmed. And as hereinbefore shown, the power of the pueblo to make grants that should vest title in private ownership, unlike that of the State, did not extend to that of making grants upon the sea shore. The fee of all the land (which had not passed into private ownership) remained always in the Government, and that upon the sea shore was unincumbered by the trust or power conferred upon

the pueblo. The result was that upon the conquest all the property upon this peninsula which had not already passed into private ownership became part of the public domain of the United States, and subject to the same laws as affected other portions of the public domain.

But in executing or carrying out the provisions of the treaty of Guadalupe Hidalgo, our Government added the features of our own townsite laws, and saw fit to vest in the successor of the pueblo the fee of that, over which, before, the pueblo had exercised power only as the agent of the sovereign. The land thus became subject to the combined trusts created by the Mexican law relating to pueblos and the American law relating to townsites. In this sense, and this only, the patent from the United States became a grant; but as such it could convey nothing which had at the conquest become a part of the public domain, unincumbered with the trust resting in the pueblo. The premises being a portion of the public domain, unincumbered by said trust, the title thereto, in accordance with the laws of the United States, passed out of the Federal Government before the making of the patent.

It is claimed on behalf of appellant that *quantity* was the controlling element in the decree of confirmation. It is enough to say that while quantity was required, and the claimant was entitled to quantity, it was no more controlling than the natural boundaries on the north, east and west fixed by the decree, and the decree itself gave leave to go south for quantity. But it did not give leave to go north, east or west for quantity, even if the Government had possessed lands of its own in those directions which it had power to appropriate to make up quantity.

In view of what was said in the former opinion, which

this is not intended either to supersede or modify, but merely to supplement, it does not seem necessary to further extend this discussion. After a careful review of all the authorities cited and arguments made, we still adhere to the conclusion reached in said former opinion in bank, that the judgment of the Court below must be affirmed.

So ordered. FOX, J.

We concur:

SHARPSTEIN, J.,

PATERSON, J.

CONCURRING OPINION.

IN BANK. BY THORNTON, J.

In whatever point of view this case may be regarded, I am of opinion that the evidence was admissible to show that the land in controversy was situated below the ordinary high-water mark of the Bay of San Francisco, as it existed on the 7th day of July, 1846.

Whatever the right of the pueblo was to the land, for which confirmation was sought by the City of San Francisco, was never held to extend below the ordinary high-water mark of the bay. It was so adjudged by the decree of confirmation entered in May, 1865. The Act of Congress of March 8, 1865, ratified the decree as it was made and entered.

If there was no judicial determination binding on the State fixing a different boundary from that of high-water mark as determined by the decree, the evidence above referred to in my judgment was clearly admissible. As the decree adjudges to the city nothing beyond high-

water mark, evidence was admissible to locate this line so as to show that the land sued for was outside of that line.

In my opinion the patent which sets forth the decree shows no different determination as to this line from that set forth in the decree itself. The patent shows the only other determination insisted on: and this, when rightly construed, does not vary from the decree. To rightly construe the patent, the whole of it must be taken into view, and regarding all its parts, high-water mark should be held to be the controlling call to which course and distance must yield. The patent is but the execution of the decree. (*United States* vs. *Minor*, 114 U. S. Reps., 241–42.) The survey and the patent are made to carry out its provisions. The maxim that public officers are presumed to do their duty comes in aid of the view that the line of high-water mark is the controlling call. The officers who made the survey and issued the patent should not be presumed to have gone beyond the decree which they were to carry out, if it can be justly held that their acts show that they are consistent with its requirements. (See *More* vs. *Massini*, 37 Cal., 432–436, and *Jones* vs. *Martin*, 13 Saw. Cir. Ct. Reps., 317.)

I adhere to my concurrence in the opinion of Justice Paterson, delivered on the previous hearing of this case, and will add that I perceive nothing in the opinion of Justice Fox inconsistent with the opinion of Justice Paterson. With these views I must hold that the judgment should be affirmed.

THORNTON, J.

DISSENTING OPINION.

I dissent. I could not express my views of the question involved in an original opinion as satisfactorily to myself, and certainly not as satisfactorily to others, as they are expressed in the deliberate opinion of this Court delivered by Mr. Justice McKinstry in the recent case of *People* vs. *San Francisco*, 75 Cal., 388. The reasoning of that opinion and the authorities therein cited are, to my mind, unanswerable and conclusive. It is said that in that opinion the Court was not happy in its selection of authorities, and that it ought to have been controlled by *Doolan* vs. *Carr* (125 U. S.), *Wright* vs. *Rosebery* (121 U. S.), and *Smelting Co.* vs. *Kemp* (104 U. S., Otto). But it happens that all the authorities cited in *People* vs. *San Francisco* dealt with *the very matters involved in this case*—that is, with rights claimed under Mexican grants, with the conclusiveness of United States surveys and patents in such cases, and with powers exercised under the Act of March 3, 1851, and subsequent Acts to ascertain and settle such claims in the State of California. On the other hand, *Doolan* vs. *Carr* merely decides that the United States Land Department has no power to issue a patent to a railroad company for land as "public land," which lies within a Mexican grant. *Wright* vs. *Rosebery* merely decides that when land has been segregated and identified as swamp land a United States patent issued for it afterward is worthless; and as to *Smelting Company* vs. *Kemp*, it merely holds that a patent to a mining claim cannot be attacked collaterally in a court of law. I cannot possibly see how any of these cases have any bearing whatever on the power of the United States Government under the treaty with the Mexican Government to deter-

mine the rights of land claimants under the latter Government by any methods, and through any tribunals which she may choose to adopt for that purpose. As to any rights which the State of California had at the time of that treaty, it is sufficient to say that she had not then been born.

Moreover, the case of *People* vs. *San Francisco* was decided after the fullest argument and consideration, having been heard twice, and as it established a rule of property, it is a case to which, in my judgment, the rule of *stare decises* should be strictly applied. I think, therefore, that the judgment in the case at bar should be reversed.

McFARLAND, J.

We concur in the dissenting opinion of Justice McFarland:

BEATTY, C. J.,
WORKS, J.

Office Supreme Court U. S.
FILED.
OCT 21 1891
JAMES H. McKENNEY,

In the Supreme Court of the United States.

OCTOBER TERM, 1891.

THOMAS KNIGHT,
Plaintiff in Error,

v.

THE UNITED LAND ASSOCIATION ET AL.,
Defendants in Error.

Brief by Mr. Galpin, for Defendants in Error

PHILIP G. GALPIN,
C. N. FOX,
Counsel for Defendants in Error.

SAN FRANCISCO
W. A. Woodward & Co., Printers, 12 Sutter Street
1891

IN THE

SUPREME COURT

OF THE

UNITED STATES.

THOMAS KNIGHT,
Plaintiff in Error,

v.

THE UNITED LAND ASSOCIATION ET AL.,
Defendants in Error.

Brief for Defendants in Error by Mr. Galpin Supplemental to that of Mr. Fox.

STATEMENT.

The Premises are in fact Below and Outside of the Line of High Tide.

The action being ejectment, and the plaintiff below having put in evidence a title derived from the State of California, proceeded to locate the premises on the surface of the earth.

Plaintiff proved by oral and documentary evidence, maps, official and unofficial, surveys, public and pri-

vate, all of them of earlier origin and date than the survey in the patent *afterwards* offered by defendant below, that the *locus in quo* was below ordinary high-water mark as the same existed at the conquest.

High-water mark is not difficult to fix owing to the fact that the tide rises in the center of the bay of San Francisco to the same height that it did in July, 1846; and by running levels, surveyors can establish with mathematical certainty that any given point was then above or below that surface of the tide. In fact all the official surveys of the streets of the city locate the corners at so much above "*base*," which is the line of high tide established and permanently marked at the water front.

Whatever the proof, whether easy or difficult, matters not. When offered it was admissible, and it established the location. It proved that the *locus in quo* was outside of the land confirmed under the treaty of Guadalupe Hidalgo to the Mexican Citizen, the City of San Francisco. Being below the line of high tide that land did not belong to the United States, but to the State by virtue of her sovereignty.

The City had no Claim below the Line of High Tide.

That the *locus in quo* was not within the land which belonged to the city, is apparent from the decree of the United States Circuit Court in the case of the City of San Francisco *v.* the United States, made by Mr.

Justice Field and found at page 12, fol. 22, of the transcript:

"The land of which confirmation is made is a tract situated within the County of San Francisco, and embracing so much of the extreme upper portion of the peninsula *above high-water mark* (as the same existed at the date of the conquest of the country, viz: 7th of July, 1846), in which the City of San Francisco is situated, as will contain an area of four square leagues. * * * * Said tract being bounded on the north and east by the Bay of San Francisco, west by the Pacific Ocean, and on the south by a due east and west line drawn so as to include the area aforesaid."

The Legislative and Judicial History of the Line of High Tide as the Boundary to State and City.

The City of San Francisco has never asserted any rights below high-water mark until within a very few years. On the contrary, as early as June, 1855, she passed the Van Ness ordinance whereby the Common Council declared in the first section thereof: "It shall be the duty of the Mayor to enter at the proper Land Office of the United States, at the minimum price, all the lands *above the natural high-water mark of the Bay of San Francisco at the time of the admission of California into the Union as a State*, situated within the corporate limits of the City, &c., &c., for the use, benefit and behoof of the occupants or possessors thereof, according to their respective interests."

By Sec. 10: "Application shall be made to the Legislature to confirm and ratify this ordinance and to

Congress to relinquish all right and title of the United States to said lands for the uses and purposes hereinbefore specified."

Action of State.

The State also asserted her title up to the line of high tide, by the Act ratifying the above ordinance, passed March 11, 1858, Stat. Cal., 1858, p. 52, for she therein declared that "the land *entered on or to be entered* in the United States Land Office, *in pursuance of section one* of the first recited of said ordinances, in trust, shall pass and inure to and be deemed to have immediately vested in the occupants thereof, &c., &c.

Sec. 2. "*Provided*, that nothing in this act shall be so construed as to * * * affect or release to said City and County *any title this State has or may have to any lands* in said City and County." Stat. Cal., 1858, p. 56.

Action of Congress.

On July 1st, 1864, Congress, in accordance with the statement in the ordinance, relinquished and granted all the right and title of the United States to the lands "within the corporate limits of the City as defined in the Act of April 15th, 1851, * * * for the uses and purposes specified in the ordinances of said City, ratified by the Act of Legislature of said State, approved March 11, 1858."

By the Act of March 8, 1866, Congress relinquished and granted to the City of San Francisco "all the right, title and interest of the United States to the

land * * * confirmed to the City of San Francisco by the decree of the Circuit Court of the United States, entered May 18, 1865."

14 Stat. at Large, p. 4.

The City, State and United States thus fixed the line of high tide of 1846 as the boundary between the State and City; and the State asserted her title below that line in the following Statutes:

"*To authorize the Governor of the State to convey certain property in the City and County of San Francisco to the United States.*"

Stat. Cal. 1854, p. 149.

"*Providing for sale of property of State within water line front of City.*

Stat. Cal., 1853. 36, 219.
Stat. Cal., 1855, 226.
Stat. Cal., 1858, 139.
Stat. Cal., 1858, 323.
Stat. Cal., 1863, 463.

Declaring Mission Creek navigable.

Stat. Cal., 1854, 18.

"Commissioners to take charge of tide lands."

Stat. Cal., 1867, 717.
Stat. Cal., 1869, 541.
Stat. Cal., 1873-4, 858.

The Supreme Court of this State has always steadily adhered to this line in its decisions: That the land below high tide along city front belonged to the State was recognized in the following cases:

Chappin *v.* Bourne, 8 Cal., 294.
Guy. *v.* Hemance, 5 Cal., 73.
People *v.* Klumpke, 41 Cal., 263,
Le Roy *v.* Dunkerly, 54 Cal., 452.
Farish *v.* Coon, 40 Cal., 33.

In accordance with the universal opinion at that time of the bench and bar of this State, guided by his knowledge of prior ordinances of the City, Statutes of the State, the Act of Congress of 1864, and your own repeated decisions and those of the State Courts (that land below the line of ordinary high water mark belonged to the State) the most accomplished and able jurist of this coast, the most exact thinker, the most precise and lucid expresser of his thought, Mr. Justice Field, in the decree dated in May, 1865 (City of S. F. *v.* United States), gave the specific boundaries of the land confirmed, in language which, while it betrayed the parentage of his thought in the Van Ness ordinance, expressed that thought in words which can never be warped or twisted to mean aught else than what he said, "the land of which confirmation is made is a tract situated * * * and *embracing so much of* the extreme upper end of the peninsula *above high water mark as the same existed at the date of the conquest, etc.*" Here we have judicial ratification of

the boundary line specified in the ordinance, ratified in State Statutes, confirmed by Act of Congress, and in all respects consistent with repeated decisions of yourselves and the Supreme Court of California.

Thenceforth there was no room for doubt, had any existed; the common boundary of the two titles was undisputed; men bought and sold and hypothecated titles of State and City, knowing well the exact boundary of each.

The line of high tide had been carefully surveyed and plotted, and the official maps of it are to-day found in the archives of the City. No *searcher even*, of those days, was in doubt as to the validity of the State title below high water mark, and of the City title above it.

In the State Court this line of demarcation was steadily adhered to down to and including the present case, with one exception only.

In the Circuit Court of the United States, however, in 1878, and in the case of Tripp *v.* Spring (5 Sawyer, 209) the Court appears to have decided that the line of high tide ought to be run across the mouth of Mission Bay; not because the line is there, but because in making what is called the red line map the makers thereof drew the red line across the mouth of that estuary; but wherever the proofs in Tripp *v.* Spring established the line to be, it is certain that the proofs in this case determine, that the *locus in quo* was below the surface of ordinary high water in 1846. The present case was not finally disposed of in the Supreme Court

of California until it had been thrice argued and twice decided. On the argument numerous counsel appeared for the defendant and briefs upon briefs were filed. Unless the State Court is unmistakably wrong we suppose the judgment will stand. A reversal would be a public calamity.

Notwithstanding the declaration in Tripp *v.* Spring, p. 215, "that any patent of the United States which may hereafter be issued to the City from the Land Department at Washington could neither add nor take from the title already vested in the City and those claiming under it;" the Commissioner of the General Land Office in November, 1878, placidly pursued the specific boundary of the line of high tide in 1846, as given in the decree; being compelled so to do, as were the surveyors, by their oaths of office and by the direction of the Act of Congress of July 1st, 1864, Section 7, "An Act to expedite the settlement of titles to lands in the State of California." This survey, approved by the Commissioner of the General Land Office in the opinion delivered November 11th, 1878, was subsequently disapproved by Secretary Teller, who ordered the line to be run in accordance with the views expressed in Tripp *v.* Spring, and it was run without reference to the line of high tide.

The plaintiff below relies on the following

POINTS.

I.

The political department of the Government known as the Department of the Interior has no power to carry into effect the provisions of the Treaty of Guadalupe Hidalgo, except in so far as that power is conferred by Acts of Congress. No power in that regard is given save by the Act of March 3, 1851, relative to settlement of private land claims and the Acts amendatory thereof.

9 Stat. U. S., 631.
13 Stat. U. S., p. 332, §7.
14 Stat. U. S., p. 218.

II.

The Department of the Interior is not authorized to order a patent for land to any Mexican citizen or his successors in interest, in satisfaction of the treaty, except of land that has first been confirmed to that citizen by the judicial tribunals appointed by Congress to ascertain and settle private land claims arising under the Treaty.

III.

Where a tract of land limited by specific boundaries has been so confirmed by the judicial tribunals authorized by Congress, a patent which includes lands (not public lands of the United States) outside of the boundaries given in the decree, does not operate to pass title to such outside lands.

IV.

The patent is presumptive and persuasive evidence that its courses and distances do follow the specific boundary of the decree; but it is not conclusive.

The contestant in ejectment may prove to the trial Court if he can, that the officer has exceeded his jurisdiction; and that the land included in the patent is in truth outside of the grant confirmed, and, therefore, outside the conveying power.

To deny this is to assert simply that the Department of the Interior, without authority to adjudicate upon what land shall be confirmed or conveyed, may issue a patent to land not confirmed; and the conveyance passes title to the outside land, until and unless the party affected by the overlap shall bring suit to cancel that part of the description and reform the patent. That is to say, a patent to land outside of the jurisdiction of the officer, conclusively proves that the land is within it. So that if the decree confirms the Peninsula of San Francisco, the Land Office may patent the City of Oakland, and the patent passes the title to the land in the later city! If this be so, the patent becomes more potent than the decree, and the Court becomes an appendage of the Land Office.

V.

If the Court has confirmed a Spanish grant for a certain number of leagues to be located within certain larger exterior boundaries, (as has often occurred in this State,) the Court by its decree has confirmed the

grant to every part of the land up to the exterior boundaries and the whole of that land is placed within the jurisdiction of the land office, for the purpose of surveying and patenting the number of acres allotted to the claimant. This duty although in a measure judicial (where no restriction of specific boundaries is contained in the decree) is chiefly ministerial, and may be exercised anywhere within the exterior boundaries.

It results that so long as the survey and the patent are restricted to land within the exterior boundaries, the land is within the conveying power of the officer. It has been placed within his grasp by the decree of the Court.

VI.

But if a river, the sharp crest of a mountain ridge, or the overflowing surface of the bay impinging on the shore, defines the exterior boundary of the grant and the decree allots to the claimant, for instance, four square leagues in a square form lying next north and west of the specific boundary, and the surveyor chooses to patent land *outside* of the exterior boundary, and south and east of it, the land so patented, not being public land of the United States and unconfirmed to the claimant, is not within the conveying power of the officer.

Such is precisely this case; the land confirmed was no more than "*so much* of the extreme upper portion of the peninsula" "*above ordinary high water mark*," and within an east and west, southern boundary line "as will contain" four leagues.

The Surveyor knowingly and remonstrating, was compelled by order of the Secretary of the Interior, to cross this line and go *outside* of the exterior boundary of the land confirmed. The patent covered land which had not been the property of the United States after the admission of California into the Union in September, 1850.

VII.

Nor is it any answer to say that notwithstanding the admission of California into the Union, she did not take this property discharged of the right of the Government to use it, if necessary, in liquidation of the obligations of the Treaty. Grant that this was so; still California did take the fee without grant and without patent, by virtue of her sovereignty, in September, 1850, subject to the right of the Government to take it from her for the purposes aforesaid. But the Government has not required it for that purpose; on the contrary, the decree of confirmation effectually removed that lien from the title of the State. It results that land below high tide was not within the conveying power of the Land Department, and the title of the State was not affected by the patent.

VIII.

It will be said, "that the specific line of 'high-water mark' yields to the more general description of 'the Bay.' That, according to all the principles of map-making, a bay takes the contour line of the coast, and that as the land is designated as lying between the

ocean and the bay, the more general description of 'the Bay' controls the words 'embracing so much of the extreme upper portion of the peninsula *above high-water mark, &c.*, on which the City of San Francisco is situated, as will contain, &c.,' that the shore line of the bay does not follow the line of high tide; and the latter is to be abandoned."

It is manifest from the decree that the words "ocean" and "bay" are words of general description. The shores of each are described by the "line of ordinary high tide." There is no such thing possible as bay shore line visible under water. The result of this interpretation is, that the specific boundary of the line of high tide is eliminated whenever the surveyor chooses to depart from it. If such a construction is admissible *at one point, it is of necessity at all others.*

He may run *anywhere from point to point* and *from headland to headland*, and include the land of the State *wherever he is disposed so to do.* The result would be, possibly, that he would touch the line of high tide only at the extreme points which jutted into the sea, commencing at the Presidio and ending at the Potrero.

He could have disturbed the title to the water front of the city. An unknown, invisible and shifting boundary of a contour line which may be run this way a mile or two, or that way a mile or two, at the caprice of the surveyor, was not a desirable boundary for the city; and none such was then intended.

IX.

The real and only question presented by this Record is as to the exclusive and conclusive evidence of the Patent. When the Plaintiff in Ejectment has located his land beyond the specific boundary given in the decree by evidence unassailed, does a Patent to land unconfirmed to the claimant override all contrary proof, and conclusively establish that this Patent is valid outside the boundaries of the decree, and that this land was confirmed to the claimant?

Respectfully submitted,

PHILIP G. GALPIN,

Oct. 10, 1891. Attorney for Defendants in Error.